No. 11048

United States
Circuit Court of Appeals
For the Ninth Circuit.

E. H. CLARKE LUMBER COMPANY,
an Oregon corporation,

Appellant,

vs.

P. N. KURTH,

Appellee.

and

P. N. KURTH,

Appellant,

vs.

E. H. CLARKE LUMBER COMPANY,
an Oregon corporation,

Appellee.

Transcript of Record

Upon Appeals from the District Court of the United States for the District of Oregon

Rotary Colorprint, 661 Howard Street, San Francisco

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Index **Page**

Index **Page**

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD:

RICHARD R. MORRIS,

Pacific Bldg.,

R. N. KAVANAUGH,

Mead Bldg.,

HUGH L. BIGGS and DAVID L. DAVIES,

1410 Yeon Bldg., Portland, Ore.

for Appellant.

CARL D. ETLING, BRUCE CAMERON,

Lumbermen's Bldg., Portland, Ore.

for Appellee.

In the Dirstrict Court of the United States
For the District of Oregon

No. Civ. 2373

P. N. KURTH,

Plaintiff,

vs.

E. H. CLARKE LUMBER COMPANY,
an Oregon corporation,

Defendant.

AMENDED COMPLAINT

Comes now the plaintiff and for cause of action against the defendant complains and alleges:

I.

That plaintiff brings this action under and by virtue of an act of Congress of the United States for the regulation of commerce among the states, to-wit, the Fair Labor Standards Act of 1938 (29 U.S.C.A., paragraphs 201-219, inclusive), as hereinafter more fully appears.

II.

That since about November 12, 1940, the defendant has been, and now is, a corporation, duly organized and existing under and by virtue of the laws of the State of Oregon, with its principal office and place of business located in the City of Sweet Home, Oregon; that during all times pertinent hereto the defendant owned, maintained and operated, as it now does, a certain sawmill for the

manufacture of sawlogs into lumber, which said sawmill has been, and now is, located in the City of Sweet Home, Oregon. That said lumber manufactured in its said sawmill is sold and shipped by means of railroad, etc., to various concerns located outside the State of Oregon, and substantially all of said lumber manufactured by said defendant was, and now is, shipped to states other than the State of Oregon, and said defendant during all of the times herein mentioned was, and now [1*] is, engaged in commerce and the production of goods for commerce within the meaning of the Fair Labor Standards Act of 1938, and was and now is subject to all the terms and provisions thereof.

III.

That subsequent to October, 1940, for a period of about six months, plaintiff was employed by said defendant as a fireman and engineer in said sawmill upon the basis of an eight hour day and a forty hour week, with time and one-half for overtime; that plaintiff during this period was actually compelled by defendant, because of the nature of his employment, to work 9 hours per day, as well as other hours, including work on Sundays, and he was actually paid by the defendant for these extra hours regular time for forty hours per week, and time and one-half for overtime.

IV.

That after this period of employment plaintiff

*Page numbering appearing at foot of page of original certified Transcript of Record.

quit working for defendant, and was absent from his employment with defendant for about three months, until about July 1941, when he was solicited for re-employment by the defendant under the same arrangements and terms as before states: and the plaintiff was again employed by defendant under the same arrangements and terms as before stated from about July, 1941, to and including about September 1, 1942; that from about July, 1941, to and including about February 14, 1942, plaintiff was employed by defendant upon the hourly rate of $.65 per hour, and from about February 15, 1942, to and including about April 11, 1942, plaintiff was employed by defendant upon the hourly rate of $.70 per hour, and from about April 13, 1942, to and including about July 11, 194, plaintiff was employed by defendant upon the hourly rate of $.75 per hour, and from about July 12, 1942, to and and said September 1, 1942, plaintiff was required employed by defendant upon the [2] hourly rate of $.80 per hour; and that between said July, 1941, including about September 1, 1942, plaintiff was by defendant in his said employment to work a total of 465 hours in excess of forty hours per week, for which he has only received 263 hours pay, leaving a balance of 202 hours pay in excess of forty hours per week due and owing for which he should have received pay at the rate of time and one-half, as appears more particularly in the itemized statement attached hereto, which said statement is referred to as Exhibit A, and by this reference made a part of this complaint as though set forth herein

verbatim; that plaintiff has received no extra wages whatsoever for said 202 hours worked in excess of said forty hours per week, but was compelled by said defendant, to work said forty hours per week plus said excess hours aforesaid; that plaintiff often demanded additional wages for said additional hours worked, in accordance with the terms and provisions of said Fair Labor Standards Act of 1938, and defendant promised that it would be made right later, but said defendant has wholly failed, neglected and refused to pay said additional sums, notwithstanding the terms and provisions of said act, and thereupon plaintiff quit said employment by reason thereof; and that by reason thereof, plaintiff is entitled to have and receive of defendant as wages, in accordance with the provisions of said act aforesaid for said excess hours worked the sum of Two Hundred Thirteen and 69/100 ($213.69) Dollars, in which amount defendant is indebted to plaintiff by reason of the facts aforesaid.

V.

That in addition to said unpaid wages of $213.69, as hereinbefore set forth, plaintiff is entitled to receive of and from defendant, under and by virtue of the provisions of said act [3] aforesaid, an additional amount equal to one and one-half times the plaintiff's regular rate of pay for all work performed in excess of 40 hours per week for the period mentioned; that is to say, plaintiff is entitled to receive of and from defendant as liquidated damages under and by virtue of the provisions of said

act an additional sum of Two Hundred Thirteen and 69/100 ($213.69) Dollars.

VI.

That plaintiff has been compelled to employ an attorney to persecute his claim for wages and liquidated damages, and plaintiff is therefore additionally entitled to have and receive of and from defendant a reasonable amount as attorney's fees; that a reasonable amount to be allowed plaintiff as attorney's fees herein is the sum of Two Hundred Fifty and no/100 Dollars, ($250.00).

Wherefore, plaintiff prays for judgment against the defendant for the full sum of Two Hundred Thirteen and 69/100 ($213.69) Dollars; for the further sum of Two Hundred Thirteen and 69/100 ($213.69) Dollars, liquidated damages; for the further sum of Two Hundred Fifty and no/100 ($250.00) Dollars, attorney's fees; and for plaintiff's costs and disbursements incurred herein.

CARL D. ETLING
CARL D. ETLING &
BRUCE CAMERON
Attorneys for Plaintiff [4]

State of Oregon,
County of Multnomah—ss.

I, P. N. Kurth being first duly sworn, say that I am the plaintiff in the within entitled action and that the foregoing complaint is true as I verily believe.

P. N. KURTH

Subscribed and sworn to before me this 22nd day of April, 1944.

[Seal] C. D. ETLING
Notary Public for Oregon

My commission Expires March 19, 1947.

Due and legal service of the foregoing Amended Complaint by receipt of a duly certified copy thereof, as required by law, is hereby accepted in Multnomah County, Oregon on this 24th day of April, 1944.

R. N. KAVANAUGH—m
Attorney for Defendant

[Endorsed]: Filed April 24, 1944. [5]

[Title of District Court and Cause.]

ANSWER TO AMENDED COMPLAINT

Comes now the defendant herein and for answer and defense to plaintiff's amended complaint admits:

I.

The allegations contained in paragraphs I and II of said amended complaint.

II.

Defendant further admits that plaintiff was employed by the defendant in its sawmill in the City of Sweet Home, Oregon, during the period from about July, 1941 to September, 1942 and in connection therewith was engaged in commerce and the

act an additional sum of Two Hundred Thirteen and 69/100 ($213.69) Dollars.

VI.

That plaintiff has been compelled to employ an attorney to persecute his claim for wages and liquidated damages, and plaintiff is therefore additionally entitled to have and receive of and from defendant a reasonable amount as attorney's fees; that a reasonable amount to be allowed plaintiff as attorney's fees herein is the sum of Two Hundred Fifty and no/100 Dollars, ($250.00).

Wherefore, plaintiff prays for judgment against the defendant for the full sum of Two Hundred Thirteen and 69/100 ($213.69) Dollars; for the further sum of Two Hundred Thirteen and 69/100 ($213.69) Dollars, liquidated damages; for the further sum of Two Hundred Fifty and no/100 ($250.00) Dollars, attorney's fees; and for plaintiff's costs and disbursements incurred herein.

CARL D. ETLING
CARL D. ETLING &
BRUCE CAMERON
Attorneys for Plaintiff [4]

State of Oregon,
County of Multnomah—ss.

I, P. N. Kurth being first duly sworn, say that I am the plaintiff in the within entitled action and that the foregoing complaint is true as I verily believe.

P. N. KURTH

Subscribed and sworn to before me this 22nd day of April, 1944.

[Seal] C. D. ETLING
Notary Public for Oregon

My commission Expires March 19, 1947.

Due and legal service of the foregoing Amended Complaint by receipt of a duly certified copy thereof, as required by law, is hereby accepted in Multnomah County, Oregon on this 24th day of April, 1944.

R. N. KAVANAUGH—m
Attorney for Defendant

[Endorsed]: Filed April 24, 1944. [5]

[Title of District Court and Cause.]

ANSWER TO AMENDED COMPLAINT

Comes now the defendant herein and for answer and defense to plaintiff's amended complaint admits:

I.

The allegations contained in paragraphs I and II of said amended complaint.

II.

Defendant further admits that plaintiff was employed by the defendant in its sawmill in the City of Sweet Home, Oregon, during the period from about July, 1941 to September, 1942 and in connection therewith was engaged in commerce and the

production of goods for commerce within the meaning of the Fair Labor Standards Act of 1938.

III.

Except as hereinafter expressly alleged the defendant makes no answer and waives defenses to all of the other material allegations, matters and things set forth in plaintiff's amended complaint.

For A Separate Affirmative Answer And Defense To Plaintiff's Amended Complaint, the defendant alleges:

I.

That this is a suit by Plaintiff for recovery of overtime or premium pay allegedly accrued for work performed within the State of Oregon, including penalty thereunder, required and [13] authorized by a statute for work performed more than six months prior to the institution of this action.

II.

That Chapter 265 of Oregon Laws 1943 provides as follows:

Section 1. Recovery for overtime or premium pay accrued or accruing, including penalties thereunder, required or authorized by any statute shall be limited to such pay or penalties for work performed within six months immediately preceding the institution of any action or suit in any court for the recovery thereof; provided, that an action may be maintained within a period of 90 days after the effective date of this act on claims heretofore accrued.

Section 2. Any law in conflict herewith to that extent is repealed hereby.

Section 3. It hereby is adjudged and declared that existing conditions are such that this act is necessary for the immediate preservation of the public peace, health and safety; and an emergency hereby is declared to exist, and this act shall take effect and be in full force and effect from and after its passage.

That said law is now and has been for more than ninety days prior to the institution of this action, in full force and effect.

III.

That this action was not commenced within the time limited by law, as provided in said Chapter 265 of Oregon Laws 1943 and, therefore, it may not be maintained.

Wherefore, defendant demands judgment that plaintiff take nothing by reason of his amended complaint, that this action be dismissed and that defendant have judgment against plaintiff for its costs and disbursements incurred herein.

R. N. KAVANAUGH
R. R. MORRIS
DAVID L. DAVIES [14]

State of Oregon
County of Multnomah—ss.

Due service of the within Answer to Amended Complaint is hereby accepted at Portland, Oregon, this 8th day of May, 1944 by receiving a copy

thereof, duly certified to as such by Hugh L. Biggs of attorneys for Defendant.

C. D. ETLING
Attorney for Plaintiff

[Endorsed]: Filed May 8, 1944. [15]

[Title of District Court and Cause.]

MOTION TO DISMISS ANSWER

The Plaintiff moves the Court as follows:

1. To strike certain portions of defendant's answer and defense to plaintiff's amended complaint, because they are indefinite, vague, redundant, sham, frivolous, and argumentative, (a) the whole of paragraph III, lines 23, 24, and 25, page 1, as follows, "Except as hereinafter expressly alleged the defendant makes no answer and waives defenses to all of the other material allegations, matters and things set forth in plaintiff's amended complaint"; (b) that portion set forth in paragraph III, line 24, page 1, as follows, "material." Clarinda Trust & Savings Bank v. Doty, 83 Or. 214, 163 P. 418, Ready v. Schmitt, 52 Or. 196, 95 P. 817, 1 Enc. of Pl. and Pr. 782, Phillips on Code Pleading, 2d ed. sec. 331.

2. To dismiss defendant's Separate Affirmative Answer and Defense to Plaintiff's Amended Complaint because it fails to state a defense to said complaint in that (a) Chapter 265 Oregon Laws 1943 has no application to the plaintiff in this ac-

tion brought under the Fair Labor Standards Act of 1938, 29 U.S.C.A. sections 201-219 inclusive. Campbell v. Haverhill, 15 S. Ct. 217, Order of Rd. Telegraphers v. Railway Express Agency, Feb. 28, 1944, ... U. S. ...., and other cases and authorities; (b) as construed and applied by the [16] defendant, said Chapter 265 Oregon Laws 1943 violates Article 1, Section 8, of the United States Constitution in that it interferes with the power of Congress to regulate commerce among the several states in a field already occupied by Congress. Concordia Fire Ins. Co. v. Illinois, 292 U. S. 535, 545, Port Richmond & C. Co. v. Board of Chosen Freeholders, 234 U. S. 317, Western Union Tel. Co. v. Kansas, 216 U. S. 1, and other cases and authorities; (c) as construed and applied by the defendant, said Chapter 265 Oregon Laws 1943 violates the Fourteenth Amendment of the United States Constitution in that it deprives plaintiff of his property without due process of law; and that it denies plaintiff the equal protection of the laws. Hager v. Reclamation Dist., 111 U. S. 701, 708, and other cases and authorities; (d) on its face, Chapter 265 Oregon Laws 1943 violates Article 1, Section 8, of the United States Constitution in that it interferes with the power of Congress to regulate commerce among the several states in a field already occupied by Congress. Port Richmond & C. Co. v. Board of Chosen Freeholders, Western Union Tel. Co. v. Kansas, both cited under supra, (b) and other cases and authorities, (e) on its face, Chapter 265 Oregon Laws 1943 violates the Fourteenth Amendment

of the United States Constitution in that it deprives plaintiff of his property without due process of law; and that it denies plaintiff the equal protection of the laws. Hager v. Reclamation Dist., cited under supra (c), and other cases and authorities.

It is hereby certified that in my opinion the foregoing motion is well founded in law; and is not interposed for purposes of delay.

/s/ CARL D. ETLING
Off Attorneys for Plaintiff

[17]

Due and legal service of the foregoing motion is hereby accepted this 13th day of May, 1944, by receipt of a certified copy thereof.

/s/ DAVID L. DAVIES
Of Attorneys for Defendant

[Endorsed]: Filed May 13, 1944. [18]

[Title of District Court and Cause.]

PRETRIAL ORDER

This cause came on regularly for pretrial before the Honorable James Alger Fee on May 15, 1944. Plaintiff was represented by Messrs. Carl D. Etling and Bruce Cameron, his attorneys, and defendant was represented by Messrs. Hugh L. Biggs and Richard R. Morris, of its attorneys.

Based upon the proceedings had at said pretrial hearing, it is

Ordered that the following matters are admitted:

I.

That plaintiff brigs this action under and by virtue of an act of Congress of the United States for the regulation of commerce among the states, to wit, the Fair Labor Standards Act of 1938 (29 U.S.C.A., Section 201-219, inclusive).

II.

That since about November 12, 1940, the defendant has been, and now is, a corporation duly organized and existing under and by virtue of the laws of the State of Oregon, with its principal office and place of business located in the City of Sweet Home, Oregon; that during all times pertinent hereto the defendant owned, maintained and operated, as it now does, a certain sawmill for the manufacture of sawlogs into lumber, which said sawmill has been, and now is, located in the City of Sweet Home, Oregon. That said lumber manufactured by defendant in its said sawmill is sold and shipped by means of railroad, etc., to various concerns located outside the State of Oregon, and a substantial portion of said lumber manufactured by said defendant [19] was, and now is, shipped to states other than the State of Oregon, and said defendant during all of the times herein mentioned was, and now is, engaged in commerce and the production of goods for commerce within the meaning of the Fair Labor Standards Act of 1938, and was and now is subject to all the terms and provisions thereof.

III.

That plaintiff was employed by the defendant in its sawmill in the City of Sweet Home, Oregon, during the period from about July, 1941, to September, 1942, and in connection therewith was engaged in commerce and the production of goods for commerce within the meaning of the Fair Labor Standards Act of 1938.

IV.

That on or about July 11, 1942, while still in the employ of defendant, plaintiff filed a complaint with the U. S. Department of Labor, Wage and Hour Division, against the defendant regarding the wages alleged due and unpaid in his complaint, and that said Wage and Hour Division, pursuant to said complaint, made an investigation of defendant, and upon completion and termination of this investigation, plaintiff's records were returned to him by said Wage and Hour Division on or about October 14, 1943.

V.

That frequent demands were made by and on behalf of plaintiff during the time he worked for defendant, and after he left defendant's employ and during the period aforementioned for said wages, and that thereafter, through his attorney, Mr. Bruce Cameron, plaintiff made demands upon the defendant for said wages alleged due and unpaid in his complaint, and the defendant discussed these demands with said attorney for plaintiff in said attorney's office in the Lumbermen's Building, Portland, Oregon, on or about November, 1943. [20]

VI.

That this is an action by plaintiff for recovery of overtime pay allegedly accrued for work performed within the State of Oregon; that all services rendered by plaintiff to defendant were prior to September 2, 1942; that this action was instituted by plaintiff against the defendant on the 10th day of February, 1944.

VII.

That Chapter 265 of Oregon Laws 1943 provides as follows:

Section 1. Recovery for overtime or premium pay accrued or accruing, including penalties thereunder, required or authorized by any statute shall be limited to such pay or penalties for work performed within six months immediately preceding the institution of any action or suit n any court for the recovery thereof; provided, that an action may be maintained within a period of 90 days after the effective date of this act on claims heretofore accrued.

Section 2. Any law in conflict herewith to that extent is repealed hereby.

Section 3. It hereby is adjudged and declared that existing conditions are such that this act is necessary for the immediate preservation of the public peace, health and safety; and an emergency hereby is declared to exist, and this act shall take effect and be in full force and effect from and after its passage.

Said law was enacted March 10, 1943, and by its terms became immediately effective.

It Is Further Ordered that this action presents for decision the following

ISSUES OF FACT AND LAW

1. Whether Chapter 265 of Oregon Laws 1943 as set out above is a bar to the maintenance of this action.

2. Whether, since about October, 1942, plaintiff has been and now is a resident and citizen of the State of Washington .

I.

Defendant's Contentions.

Defendant contends that this is an action for overtime and premium pay and for penlties thereunder required or authorized by the Fair Labor Standards Act, and since it was not commenced [21] within the time limited by Chapter 265 of Oregon Laws 1943 as set out hereinabove, it may not be maintained.

II.

1. Plaintiff contends that Chapter 265 Oregon Laws 1943 has no application to the plaintiff in this action brought under the Fair Labor Standards Act of 1938, 19 U.S.C.A., Sections 201-219, inclusive.

2. That during the time plaintiff worked for defendant and for which he makes his claim for overtime wages and pay, from about July, 1941, to September, 1942, he was a resident and citizen of the State of Oregon; and that since about October, 1942, he has been and now is a resident and citizen of the State of Washington.

3. Plaintiff contends that as construed and applied by the defendant, said Chapter 265 Oregon Laws 1943 violates Article 1, Section 8, of the United States Constitution in that it interferes with the power of congress to regulate commerce among the several states in a field already occupied by Congress.

4. Plaintiff contends that as construed and applied by the defendant said Chapter 265 Oregon Laws 1943 violates the Fourteenth Amendment of the United States Constitution in that it deprives plaintiff of his property without due process of law; and that it denies plaintiff the equal protection of the laws.

5. Plaintiff contends that on its face, Chapter 265 Oregon Laws 1943 violates Article 1, Section 8, of the United States Constitution in that it interferes with the power of Congress to regulate commerce among the several states in a field already occupied by Congress.

6. Plaintiff contends that on its face, Chapter 265 Oregon Laws 1943 violates the Fourteenth Amendment of the United States Constitution in that it deprives plaintiff of his property [22] without due process of law; and that it denies plaintiff the equal protection of the laws.

7. Plaintiff contends that, as construed and applied by the defendant, said Chapter 265 Oregon Laws 1943, violates Article I, Section 10, of the United States Constitution in that it impairs the obligation of contracts in existence between the parties.

8. Plaintiff contends that on its face Chapter 265 Oregon Laws 1943, violates Article I, Section 10, of the United States Constitution in that it impairs the obligation of contracts in existence betweeen the parties.

9. Plaintiff contends that, as construed and applied by the defendant, said Chapter 265 Oregon Laws 1943 violates Article VI of the United States Constitution in that it unreasonably discriminates against rights arising under the Fair Labor Standards Act of 1938, 29 U.S.C.A., Section 201-219, inclusive.

10. Plaintiff contends that on its face Chapter 265, Oregon Laws 1943, violates Article VI of the United States Constitution in that it unreasonably discriminates against rights arising under the Fair Labor Standards Act of 1938, 29 U.S.C.A., Section 201-219, inclusive.

It Is Further Ordered that the paties hereto, represented by their respective attorneys, have agreed:

I.

If the court should find plaintiff is entitled to prevail in this action on the issues presented, judgment shall be entered in his favor and against the defendant for the sum of $427.38.

II.

If this court should find plaintiff is entitled to prevail in this action on the issues presented, judgment shall further be entered in his favor and against the defendant for such [23] further sum

as the court may adjudge reasonable at attorney's fees.

The foregoing is certified to be a record of the proceedings had at the pretrial of this court, and it is

Ordered that the issues to be tried herein shall be those herein set forth as issues of law and fact; it is further

Ordered that the pretrial conference in this case having been held and participated in by all parties, the pleadings now pass out of the case, and the foregoing pretrial order shall control the subsequent course of the trial and shall not be hereafter amended except by consent of the parties or by order of the Court to prevent manifest injustice.

Done and dated in open court this 24th day of November 1944.

CLAUDE McCOLLOCH
United States District Judge.

Approved:

CARL D. ETLING
Of Attorneys for Plaintiff.
R. N. KAVANAUGH
Of Attorneys for Defendant.
R. R. MORRIS
Of Attorneys for Defendant.
HUGH L. BIGGS
Of Attorneys for Defendant.

[Endorsed]: Filed Nov. 24, 1944. [24]

TESTIMONY OF P. N. KURTH

(Tr. Pages 3-8)

P. N. KURTH,

the plaintiff, was thereupon produced as a witness in his own behalf and, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Etling:

Q. Will you state your name, please.

A. P. N. Kurth.

Q. And are you the plaintiff in the case of P. N. Kurth v. Clarke Lumber Company, No. Civil 2373?

A. Yes, sir.

Q. And where do you live, Mr. Kurth?

A. Vancouver, Washington.

Q. And what is your occupation?

A. Truck driver now.

Q. I beg pardon? A. Truck driver.

Q. Were you formerly employed by the defendant in this case, the Clarke Lumber Company, at Sweet Home, Oregon? A. Yes, sir.

Q. And in what capacity were you employed by the defendant? A. Fireman and engineer.

Q. Fireman and engineer? A. Yes, sir.

Q. During what dates were you employed by the defendant?

A. From about October, 1940, to September, 1942.

Q. And in this connection you are making a claim against defendant for overtime wages under the Fair Labor Standards Act of August '38?

(Testimony of P. N. Kurth.)

A. Yes, sir.

Q. And are you asserting this claim for wages earned? You are asserting this claim for wages during what date?

A. From about July, 1941, to September, 1942.

[25]

Q. Now during the time you worked for the defendant in its mill at Sweet Home, Oregon, where did you live? A. At Sweet Home.

Q. And did you move from Sweet Home subsequently? A. Yes, sir.

Q. And when did you move?

A. September, 1942.

Q. And where did you go? A. Portland.

Q. To Portland. How long did you live in Portland? A. About a month.

Q. And did you leave Portland?

A. Yes, sir.

Q. Where did you go?

A. Vancouver, Washington.

Q. Now when did you move from Portland, Oregon, to Vancouver, Washington?

A. It was——

Q. Just approximately what month?

A. The first part of October, I think.

Q. The first part of October, 1942?

A. Yes, sir.

Q. Have you lived anywhere else since you moved to Vancouver, Washington?

A. No, sir.

Q. Until the present time? A. No, sir.

(Testimony of P. N. Kurth.)

Q. Do you have a family? A. Yes, sir.

Q. And did your family move with you to Washington? A. Yes, sir.

Q. When you moved to Vancouver, Washington, from Oregon, was it your intention to acquire a new residence and domicile? [26]

A. Yes, sir.

Q. And do you own your home there?

A. Yes, sir.

Q. Did you own your home there prior to moving there? A. No, sir.

Q. You purchased a home? A. Yes.

The Court: When did he purchase it?

Mr. Etling: Q. When did you purchase your home in Washington?

A. Along about November, 1942.

Q. Now what is the address of the home you purchased?

The Court: That is all you need to show.

A. Route 4, Box 208.

The Court: Cross examine.

Mr. Etling: There is one more point I want to bring out, your Honor?

The Court: What is it?

Mr. Etling: Q. That is, did the plaintiff have any actual knowledge whatsoever, either before or at the time he filed this action, that the 1943 Oregon Legislature had passed a law, Chapter 265, Oregon Laws, 1943, imposing a statute of limitations on actions for overtime pay?

(Testimony of P. N. Kurth.)

Mr. Biggs: We will object to that for the purpose of the record, if the Court please, on the ground it is immaterial.

The Court: He may answer, subject to the objection. Answer. Did you know? Did you know about this law? A. No, sir.

The Court: Did you, Mr. Etling?

Mr. Etling: No, I didn't.

The Court: Cross examine.

Cross Examination

By Mr. Biggs: [27]

Q. By whom are you employed as truck driver, Mr. Kurth?

A. Vancouver Housing Authority.

Q. Vancouver Housing Authority?

A. Yes, sir.

Q. And for how long?

A. The last two years.

Q. Ever since you have been in Vancouver?

A. Yes, sir.

Q. You have been employed by the Housing Authority?

The Court: Do you intend to contest diversity of citzenship?

Mr. Biggs: No, your Honor. I don't intend to contest the residence. I just want to show any other facts that might be material.

Q. What area did you serve with your truck, Mr. Kurth?

A. The project they call Ogden Meadows.

Q. That is in Vancouver, is it?

(Testimony of P. N. Kurth.)

A. On the outskirts.

Q. And were you required to haul material from Oregon? A. No, sir.

Q. Did you do hauling from Oregon at all?

A. Not that I know of.

Q. I was just wondering if in connection with your business you had occasion to come over to Portland, and in and around Portland, during that period of two years? A. No, sir.

Q. Pardon me? A. No, sir.

Q. You did some of your trading, though, in Portland, I suppose? A. Yes, sir. [28]

Q. And Vancouver is part of the Metropolitan Portland area, is it not? A. Yes, sir.

Q. You probably took Portland newspapers?

A. Yes, sir.

Mr. Biggs: That is all.

(Witness excused.) [29]

REMARKS OF JUDGE IN DECIDING CASE

(Tr. Pages 115-119.)

The Court: It doesn't matter. This Act was passed on March 20th.

Mr. Biggs: That is correct.

The Court: And it was approved by the Governor on that date and it became effective immediately, and so the ninety days as to accrued claims began to run then, so they all ran out June 20th,

approximately, and the 1942 Session Laws were published and in the hands of the profession sometime early in June and there were nine or ten days, you said here the other day, between the time of the publication.

Mr. Davies: I am sure it would not exceed two weeks probably. It might have been somewhere between ten days and two weeks.

The Court: As bearing on the question of reasonableness of this legislation I attach a great importance to that, and I attach considerable importance to the reaction in the profession to that tinkering that was done with the practice act back there in 1927. The reaction was very violent. I haven't had time to go back and look over the periodicals of the time but I am sure that the Bar Associations in the state took some action about it and took a firm position against that sort of legislation. I am told, further, that the reason for that 1927 Act was because of a particular situation in a particular county. There was a lawyer's fight in a certain county in the state, and so that was the idea. The gentlemen on the bottom of the heap decided the way to correct that situation was to go to Salem and have the Legislature pass an act prohibiting the trial judge thereafter from extending ex parte the time when transcripts for appeal might be filed, as that Legislature dealt with, so all the unfortunate bystanders throughout the state who had appeals [30] being made up at that time, and relying on ex parte orders, got caught. I imagine they had a hard time explaining to their clients the mys-

terious processes of legislation. I don't think anybody could approve of that. I don't think anybody would.

My recollection has been Senator Rand's father was the one who had written the information. He had denounced that way of legislating on that kind of matter bitterly, although he felt impelled in upholding it, but the books show Judge Burnett worte the opinion of the Court.

So in this case, as to the time element and as to the 90-day clause, I think as a practical matter I am dealing with the time that was allowed to the profession and to the interested parties pretty much after the law became public and notice to the profession through publication of the Session Law, which was, as it has been said, probably only about two weeks.

Now I have had lots of difficulty with the Koshkonong decision but I think I can and should follow the construction that has been put on the statute by the state judge who ruled on it, which has been presented. You all know that, getting in the Federal Courts, we are bound, even before Erie v. Thompson, we are bound in the construction of state statutes by the construction given them by the local judges, and this opinion you have given me from Judge Skipworth dealt with the same kind of a case as this presented here. It was a man who had an accrued claim and who brought his claim, not only more than ninety days after the passage of the Act but he brought it more than six months after the passage of the Act. So the questions were im-

plicit in the same record before Judge Skipworth as are present here and Judge Skipworth goes the whole length in upholding the statute and denies the man relief down there and says it is a bar against the prosecuting of his claim, not because he didn't bring it within six months but because he didn't bring it within ninety days. And so it seems to me that would be just going afield, unnecessarily and improperly, if I approach a decision [31] in this case in any different way than Judge Skipworth approached a decision of an exactly similar case. He thought he was upholding the 90-day clause, and says so, and said that was what the man's rights were to be tested by, and that is what he tested them by.

So I think the question I have to decide here, and the only one I have to decide, and the only one I wish to decide, is, taking that construction of the statute, guided by the local judge as to whether the 90-day statute is unreasonable in its effect on the operation of the Federal Wages and Hours Act, under which this man claims, and because I attach so much importance as a practical matter to the working of the emergency clause, by that I mean the fact that the statute didn't come to the notice of the public through the usual channels, the publication of the official Session Laws, until a very short time before the 90-day period ran out, I don't feel able to uphold the 90-day clause, contrary to Judge Skipworth's rulings. I am bound by his ruling, I feel, as to the state Constitutional questions that have been presented.

While the point was raised by Mr. Etling, this morning for the first time, that this was an amendment to the existing limitations statute, and did not comply with the procedural requirement of the state Constitution, that was implicit in the case before Judge Skipworth and while not presented to him there it would be presumptuous for me to consider it here, but I am not bound by Judge Skipworth's holding as to the Federal question, whether or not the 90-day clause as to accrued claims arising in the Federal Wages and Hours Act, and I take a contrary opinion and will allow recovery, and will allow Mr. Etling $250 attorney's fees.

Mr. Etling: $250, your Honor?

The Court: Yes. Adjourn court until tomorrow morning, ten o'clock.

(Thereupon, at 12:40 o'clock P. M., Court was adjourned.) [32]

Due and legal service of the within designation of contents of record on appeal is hereby admitted at Portland, Oregon, this 16th day of April, 1945.

C. D. Etling

Of Attorneys for Plaintiff

[33]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on regularly for trial on November 24, 1944 before the Honorable Claude McCul-

loch, one of the Judges of the above entitled Court, sitting without a jury, and the plaintiff appearing in person, and by Mrssrs. Carl D. Etling and Bruce Cameron, his attorneys, and the defendant appearing by Messrs. Richard R. Morris, David L. Davies and Hugh L. Biggs, of its attorneys, and the Court having heard and considered evidence on behalf of the plaintiff pursuant to the pre-trial order heretofore agreed upon on the question of residence of the plaintiff, the rest of the facts necessary for this decision having been stipulated and agreed upon in said pre-trial order, and briefs having been submitted by the parties hereto, and the Court having heard and considered arguments of counsel, and having fully considered all matters of law and fact presented at the trial hereof, and being now fully advised, makes the following Findings of Fact:

FINGINGS OF FACT

I.

That plaintiff commenced this action on Febru ary 10, 1944, under Section 16 (b) of the Fair Labor Standards Act of 1938, which is an act of Congress of the United States for the regulation of commerce among the States (29 U.S.C.A., Sections 201-219, inclusive) to recover unpaid overtime compensation, an additional equal amount as liquidated damages, and his reasonable attorney's fees. [34]

II.

That during the time plaintiff worked for defendant and for which he makes his claim for over-

time wages and pay, from about July, 1941, to September, 1942, he was a resident and citizen of the State of Oregon; and that since October, 1942, he has been and now is a resident and citizen of the State of Washington.

III.

That since about November 12, 1940, the defendant has been, and now is, a corporation duly organized and existing under and by virtue of the laws of the State of Oregon, with its principal office and place of business located in the City of Sweet Home, Oregon; that during all times pertinent hereto the defendant owned, maintained and operated, as it now does, a certain sawmill for the manufacture of sawlogs into lumber, which said mill has been, and now is, located in the City of Sweet Home, Oregon; That said lumber manufactured by defendant in its said sawmill is sold and shipped by means of railroad, etc., to various concerns located outside the State of Oregon, and a substantial portion of said lumber manufactured by said defendant was, and now is, shipped to states other than the State of Oregon, and said defendant during all of the times herein mentioned was, and now is, engaged in commerce and the production of goods for commerce within the meaning of the Fair Labor Standards Act of 1938, and was and now is subject to all the terms and provisions thereof.

IV.

That plaintiff was employed by the defendant as a fireman and engineer in its sawmill in the City of Sweet Home, Oregon, during the period from about July, 1941, to September, 1942, and in connection therewith was engaged in commerce and the production of goods for commerce within the meaning of the Fair Labor Standards Act of 1938.

V.

That on or about July 11, 1942, while still in the employ of defendant, plaintiff filed a complaint with the U. S. [35] Department of Labor, Wage and Hour Division, against the defendant regarding the wages alleged due and unpaid in his complaint, and that said Wage and Hour Division, pursuant to said complaint, made an investigation of defendant, and upon completion and termination of this investigation, plaintiff's records were returned to him by said Wage and Hour Division on or about October 14, 1943.

VI.

That frequent demands were made by and on behalf of plaintiff to defendant during the time he worked for defendant, and after he left defendant's employ and during the period aforementioned for said wages, and that thereafter, through his attorney, plaintiff made demands upon the defendant for said wages alleged due and unpaid in his complaint, sawmill has been, and now is, located in the City of and the defendant discussed these demands with said attorney for plaintiff in said attorney's office on or about November, 1943.

VII.

That this is an action by plaintiff for recovery of overtime pay allegedly accrued for work performed within the State of Oregon; that all services rendered by plaintiff to defendant were prior to September 2, 1942; that this action was instituted by plaintiff against the defendant on the 10th day of February, 1944.

VIII.

That Chapter 265 of Oregon Laws 1943 provides as follows:

Section 1. Recovery for overtime or premium pay accrued or accruing, including penalties thereunder, required or authorized by any statute shall be limited to such pay or penalties for work performed within six months immediately preceding the institution of any action or suit in any court for the recovery thereof; provided, that an action may be maintained within a period of 90 days after the effective date of this act on claims heretofore accrued. [36]

Section 2. Any law in conflict herewith to that extent is repealed hereby.

Section 3. It hereby is adjudged and declared that existing conditions are such that this act is necessary for the immediate preservation of the public peace, health and safety; and an emergency hereby is declared to exist, and this act shall take effect and be in full force and effect from and after its passage.

Said law was enacted March 10, 1943, and by its terms became immediately effective.

IX.

That Section 1-204 (2) Oregon Compiled Laws Annotated, 1940, provides that actions may be brought "within six years upon a liability created by statute, other than a penalty or forfeiture."

X.

That the parties agreed that if the Court should find plaintiff is entitled to prevail in this action on the issues presented in the pre-trial order, judgment shall be entered in his favor and against the defendant for the sum of $427.38, and for such further sum as the court may adjudge reasonable as attorney's fees.

Based upon the Findings of Fact heretofore made herein, the Court makes and finds the following Conclusions of Law:

CONCLUSIONS OF LAW

I.

That this Court has jurisdiction of the parties and the subject matter of this cause of action.

II.

That Chapter 265 Oregon Laws 1943, is not a bar to the maintenance of this action.

III.

That the period of 90 days afforded by Chapter 265 Oregon Laws 1943 for the maintenance of this action is unreasonably short and that said law as it affects this action is unconstitutional and void for the following reason: [37]

That it unreasonably interferes with the normal operation of the Fair Labor Standards Act and thereby violates Article I, Section 8, of the United States Constitution in that it unreasonably interferes with the power of Congress to regulate commerce among the several states in a field already occupied by Congress.

IV.

That this claim and cause of action is based upon a liability created by statute.

V.

That this action was brought within the time afforded by Section 1-204 (2) Oregon Compiled Laws Annotated, 1940 the applicable state statute.

VI.

The plaintiff is entitled to prevail in this action on the issues presented by the pre-trial order, and is therefore entitled to judgment against the defendant for the amount of his unpaid overtime compensation, $213.69, and an additional equal amount as liquidated damages, making a total of $427.38.

VII.

That plaintiff is also entitled to the additional sum of $250.00 taxed against the defendant as his reasonable attorney's fees; and for his costs and disbursements incurred in this action.

VIII.

That judgment may be entered against the defendant for the aforementioned amounts, and exe-

cution may issue against the defendant for the same.

Dated this 18th day of December, 1944.

CLAUDE McCOLLOCH
District Judge.

State of Oregon,
County of Multnomah—ss.

Due and legal service of the foregoing Findings of Fact and Conclusions of Law are hereby accepted this 15 day of December, [38] 1944, by receipt of certified copies thereof.

HUGH L. BIGGS
Of Attorneys for Defendant

[Endorsed]: Filed Dec. 18, 1944. [39]

[Title of District Court and Cause.]

MOTION TO AMEND FINDINGS OF FACT AND CONCLUSIONS OF LAW

Comes now the defendant herein and moves the court for its order amending the findings of fact and conclusions of law heretofore filed herein in the following respects:

(1) By eliminating finding of fact No. IX.

(2) By eliminating conclusion of law No. V.

This motion is made on the ground and for the reason that said finding of fact and conclusion of law are not based upon any issues of fact or law raised by the pleadings nor otherwise presented to

the Court for decision in this case on the record herein.

RICHARD R. MORRIS
R. N. KAVANAUGH
HUGH L. BIGGS
DAVID L. DAVIES
Attorneys for Defendant.

[40]

State of Oregon
County of Multnomah—ss.

Due service of the within Motion is hereby accepted at Portland, Oregon this 22nd day of December, 1944 by receiving a copy thereof, duly certified to as such by Hugh L. Biggs of attorneys for defendant.

C. D. ETLING
Of Attorneys for Plaintiff

[Endorsed]: Filed Dec. 22, 1944 [41]

[Title of District Court and Cause.]

ORDER

This cause now coming on upon motion of the defendant for an order amending Findings of Fact and Conclusions of Law heretofore entered herein, plaintiff appearing in open court by Carl Etling, of his attorneys, defendant appearing in open court by Richard R. Morris and Hugh Biggs, of its attorneys, and the court having heard the arguments of counsel for and against said motion, having fully

considered the same, and now being advised, makes the following order:

It Is Hereby Considered, Ordered, And Adjudged that the said Conclusions of Law be and the same are hereby amended so as:

(1) To amend Conclusion of Law No. 5 to read as follows: "That this action was brought within the time provided by law.."

Done and dated in open court this 27th day of December, 1944.

CLAUDE McCULLOCH
District Judge

[Endorsed]: Filed Dec. 27, 1944 [42]

In the District Court of the United States
for the District of Oregon

No. Civ. 2373

P. N. KURTH

Plaintiff

vs.

E. H. CLARKE LUMBER COMPANY, an Oregon corporation

Defendant

JUDGMENT

This cause having come on to be heard before the Honorable Claude McCulloch, a Judge of the above entitled Court, evidence, oral and by stipulation, having been submitted and this matter having been argued orally and briefs having been submitted by the respective parties, and the Court, after due consideration, having made and entered its Findings of Fact and Conclusions of Law, and this matter being now ready for judgment,

It Is Hereby Ordered And Adjudged that plaintiff have and judgment is hereby rendered against the defendant in the sum of $213.69 and an additional amount as liquidated damages, making a total of $427.38; and that plaintiff have, and judgment is hereby rendered against the defendant in the further sum of $250.00 as reasonable attorneys' fees hereby fixed by the Court in that sum; and that plaintiff recover of and from the defendant his costs and disbursements incurred in this action, taxed in the sum of $46.46;

And It Is Further Ordered And Adjudged that execution issue against the defendant for said sums.

Dated this 18th day of December, 1944.

CLAUDE McCULLOCH
District Judge

[Endorsed]: Filed Dec. 18, 1944 [43]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT COURT OF APPEALS

Notice is hereby given that E. H. Clarke Lumber Company, an Oregon corporation, the defendant above named, hereby appeals to the Circuit Court of Appeals of the United States for the Ninth Circuit from the final judgment and the whole thereof, which was entered in this action on the 18th day of December, 1944, in favor of plaintiff and against defendant.

R. R. MORRIS
R. N. KAVANAUGH
HUGH L. BIGGS
DAVID L. DAVIES
Attorneys for Defendant

[44]

State of Oregon
County of Multnomah—ss.

Due service of the within Notice of Appeal to Circuit Court of Appeals is hereby accepted at Portland, Oregon, this 31st day of January, 1945

by receiving a copy thereof, duly certified to as such by Hugh L. Biggs of attorney for defendant.

CARL D. ETLING
Of Attorney for Plaintiff

[Endorsed]: Filed Feb. 1, 1945 [45]

[Title of District Court and Cause.]

STATEMENT OF POINTS UPON WHICH APPELLANT WILL RELY ON APPEAL.

The defendant having lately filed its notice of appeal from the judgment of this court to the Circuit Court of Appeals for the Ninth Circuit, and having designated portions of the record herein to be contained in the Record on Appeal, does hereby file its statement of the points upon which it intends to rely upon appeal.

1. The District Court erred in deciding that Chapter 265, Or. Laws, 1943, is not a bar to the maintenance of this action.

2. The District Court erred in deciding that Chapter 265, Or. Laws, 1943, as applied to this action unreasonably interferes with the normal operation of the Fair Labor Standards Acts (Title 29, USCA Section 201 ff.) and therefore violates the United States Constitution in that it unreasonably interferes with the power of Congress to regulate interstate commerce among the several states in a field already occupied by Congress.

3. The District Court erred in deciding that the ninety day period prescribed in the savings clause of Chapter 265 is unreasonably short and that

Chapter 265 applied to this action is unconstitutional and void.

4. That the District Court erred in rendering judgment in favor of plaintiff and against defendant.

5. That the District Court erred in refusing to decide that if the ninety day period prescribed in the savings clause of Chapter 265 is unreasonably short as applied to this action, the statute should be so construed as to make the period of six months prescribed in said statute applicable to this action.

R. R. MORRIS
R. N. KAVANAUGH
HUGH L. BIGGS
DAVID L. DAVIES
Attorneys for defendant and appellant. [46]

Due and legal service of the within statements of points upon which appellant will rely on appeal is hereby admitted at Portland, Oregon, this 16th day of April, 1945.

C. D. ETLING
Of Attorneys for Plaintiff.

[Endorsed]: Filed April 16, 1945 [47]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

Defendant herein having lately filed its notice of appeal from the judgment of this court to the Circuit Court of Appeals for the Ninth Circuit hereby

designates the following portions of the record and proceedings in this case to be contained in the Record on Appeal.

1. Amended complaint.
2. Answer to amended complaint.
3. Motion to dismiss answer.
4. Pretrial order.
5. Testimony of the witness, P. N. Kurth (Tr. Pages 3-8).
6. Remarks of Judge in deciding case. (Tr. Pages 115-119).
7. Findings of Fact and Conclusions of Law.
8. Motion to amend Findings of Fact and Conclusions of Law.
9. Court's order on motion to amend Findings of Fact and Conclusions of Law.
10. Judgment.
11. Notice of appeal to Circuit Court of Appeals.
12. Notice of cross-appeal.
13. Statement of points upon which appellant will rely upon appeal.
14. Designation of contents of Record on appeal.

R. R. MORRIS
R. N. KAVANAUGH
DAVID L. DAVIES
HUGH L. BIGGS
Attorneys for Defendant and Appellant.

[Endorsed]: Filed April 16, 1945. [48]

[Title of District Court and Cause.]

NOTICE OF CROSS-APPEAL

Notice is hereby given that P. N. Kurth, the plaintiff above named, hereby cross-appeals to the Circuit Court of Appeals of the United States for the Ninth Circuit from that part only of the final judgment which was entered in this action on the 18th day of December, 1944, fixing $250.00 as reasonable attorney's fees in favor of the plaintiff and against the defendant.

Dated this 13th day of February, 1945.

CARL D. ETLING
BRUCE CAMERON
Attorneys for Plaintiff

Service of the foregoing notice of cross-appeal is hereby accepted this 20th day of February, 1945.

HUGH L. BIGGS
Of Attorneys for Defendant.

[Endorsed]: Filed Feb. 20, 1945 [49]

[Title of District Court and Cause.]

STATEMENT OF POINTS UPON WHICH CROSS-APPELLANT WILL RELY ON CROSS-APPEAL.

The plaintiff and cross-appellant having filed his notice of cross-appeal from the judgment of this court to the Circuit Court of Appeals for the Ninth Circuit, and having filed his designation of addi-

tional portions of the record and proceedings to be contained in the Record on Appeal, does hereby file his statement of points upon which he intends to rely on cross-appeal:

1. The Court erred in finding and concluding that plaintiff is entitled only to $250.00 as reasonable attorney's fees for the reason that based upon the record, proceedings, and evidence in this case such sum is clearly inadequate.

2. The finding and conclusion of the Court that plaintiff is entitled to only $250.00 as reasonable attorney's fees is also inadequate to compensate plaintiff and the cross-appellant for the extra work entailed in this appeal.

Respectfully submitted,
CARL D. ETLING
BRUCE CAMERON
Attorneys for Plaintiff and Cross-Appellant.

Due and legal service of the foregoing statement of points is hereby accepted at Portland, Oregon this 20 day of April, 1945, by receipt of a certified copy thereof.

HUGH L. BIGGS
Of Attorneys for Defendant.

[Endorsed]: Filed April 20, 1945 [50]

[Title of District Court and Cause.]

DOCKET ENTRIES

1944

Feb. 10—Filed complaint.

Feb. 10—Issued summons to Marshal.

Feb. 18—Filed summons with Marshal's return of service.

Mar. 13—Docketed and entered default. Fee

Mar. 20—Filed motion of deft. to set aside default.

Mar. 20—Filed docketed and entered order setting aside default. Fee

Mar. 20—Docketed and entered order setting for pre-trial on March 27, 1944 Attys. notified.

Mar. 22—Filed pltf's motion to produce under rule 34.

Mar. 20—Filed answer of deft.

Mar. 20—Filed stipulation that order of default be vacated.

Mar. 27—Filed motion to produce under rule 34 (amended). Etling.

Mar. 27—Docketed and entered record of pre-trial conference and continuance to April 10, 1944 and order admitting Karl Rodman as attorney and order canceling same. Fee

Apr. 10—Docketed and entered record of hearing on ptff's motion to produce and order allowing and record of pre-trial conference. Holcomb R. Fee

Apr. 24—Filed stipulation for order to file amended complaint.

1944

Apr. 24—Filed and entered order to file amended complaint. Fee.

Apr. 24—Filed motion for order to file amended complaint.

Apr. 24—Filed amended complaint.

May 4—Filed motion of atty. Kavanaugh for time to file answer to amended complaint.

May 4—Filed stipulation extending time to May 8, to file answer to amended complaint.

May 4—Filed docketed and entered order allowing deft. to May 8 to file answer to amended complaint. Fee

May 8—Filed answer to ptff to strike and to dismiss as to answer.

May 13—Filed motion of ptff to strike and to dismiss as to answers.

May 15—Record of pre-trial and cont. to May 22, 1944 and order reserving motions. Fee

May 22—Record of further pre-trial. Fee

June 9—Pre-trial order submitted to Judge. Fee

July 14—Filed plaintiff's brief.

Sept. 18—Entered order allowing deft. 10 days to file brief; allowing ptff "a reasonable time to reply and continuing for argument on legal question. Fee

Sept. 27—Filed defendant's brief.

Oct. 30—Entered order setting for hearing on Nov. 26, 1944. Fee

Oct. 31—Entered order setting for hearing on Nov. 22, 1944. Fee

1944

Nov. 17—Entered order resetting for hearing on Nov. 24, 1944 at 10 a. m. (attys. notified) McC

Nov. 24—Filed and entered pre-trial order. McC

Nov. 24—Record of trial before court. taken under advisement. (Person Rep.) McC

[51]

Dec. 8—Record of trial resumed — Record of opinion allowing recovery by pltfs. and $250.00 atty. fees and order to prepare finding, conclusions and judgment. McC

Dec. 18—Filed and entered Findings of Fact and Conclusions of Law McC

Dec. 18—Filed and entered Judgment for Pltf. McC

Dec. 18—Filed notice in connection with taxation of costs.

Dec. 22—Filed motion to amend findings of fact and conclusions of law.

Dec. 26—Record of hearing on above motion — taken under advisement. McC

Dec. 27—Filed and entered order to amend conclusion of law #5 McC.

1945

Feb. 1—Filed notice of appeal by defendant (copy served by deft.)

Feb. 19—Filed and entered order approving bond and granting supersedeas. McC

Feb. 19—Filed supersedeas bond. McC

Feb. 20—Filed notice of cross-appeal by ptf.

Feb. 20—Filed cost bond on cross-appeal.

1945

Mar. 9—Filed stipulation for extending time of filing record of appeal.

Mar. 9—Filed motion for extending time of filing record of appeal.

Mar. 9—Filed and entered order extending time of filing record of appeal to April 12, 1945

Mar. 9—Filed transcript of evidence to arguments in duplicate.

Apr. 9—Filed motion to extend time for docketing record on appeal.

Apr. 9—Filed stipulation.

Apr. 9—Filed and entered order on above motion. McC.

Apr. 16—Filed designation of contents of record on appeal.

Apr. 16—Filed statement of points upon which appellant will rely on appeal.

Apr. 20—Filed statement of points of cross-appellant.

Apr. 20—Filed designation of record by cross-appellant.

Apr. 20—Filed docketed and entered order to include transcript of evidence and arguments. McC

Apr. 23—Filed additional designation by cross-appellant. [52]

[Title of District Court and Cause.]

ORDER

It appearing that the Designation of Contents of the Record on Appeal in the above entitled cause does not include the transcript of Evidence and Arguments of November 24, 1944, December 8, 1944 and December 26, 1944 but only includes pages 3 to 8 and pages 115 to 119 inclusive of the transcript and that the remainder of the transcript has been omitted from the record on appeal, and the court being of the opinion that the entire transcript of proceedings should be presented to the appellate court for consideration,

Now, Therefore, It Is Hereby Ordered that pursuant to Rule 75 (h) of the Federal Rules of Civil Procedure, the entire transcript of the proceedings above mentioned be included by the Clerk of this Court in the Record on Appeal.

Dated this 20th day of April, 1945.

CLAUDE McCOLLOCH
Judge

[Endorsed]: Filed April 20, 1945 [53]

[Title of District Court and Cause.]

DESIGNATION OF ADDITIONAL PORTIONS OF RECORD AND PROCEEDINGS.

Plaintiff and cross-appellant to the United States Circuit Court of Appeals for the Ninth Circuit

hereby designates the following additional portions of the record and proceedings in this case to be contained in the Record on Appeal.

1. Transcript of United States District Court Clerk's docket entries.
2. Statement of points upon which cross-appellant will rely upon cross-appeal.
3. Designation of additional portions of record on cross-appeal by cross-appellant.
4. Notice of Cross Appeal.

Respectfully submitted,
CARL D. ETLING
BRUCE CAMERON
Attorneys for Plaintiff and
Cross-Appellant.

Due and legal service of the foregoing designation of record is hereby accepted at Portland, Oregon this 20 day of April, 1945, by receipt of a certified copy thereof.

HUGH L. BIGGS
Of Attorneys for Defendant.

[Endorsed]: Filed April 20, 1945 [54]

[Title of District Court and Cause.]

ADDITIONAL DESIGNATION BY PLAINTIFF CROSS-APPELLANT.

Plaintiff and cross-appellant to the United States Circuit Court of Appeals for the Ninth Circuit hereby designates the following additional portions of the record and proceedings in this case to be contained in the Record on Appeal.

1. Court's order to transmit Transcript of Evidence and Arguments to Circuit of Appeals.

2. Additional designation by Plaintiff Cross-Appellant.

Respectfully submitted,
CARL D. ETLING
BRUCE CAMERON
Attorneys for Plaintiff and Cross-Appellant.

Due and legal service of the foregoing additional designation of record is hereby accepted at Portland, Oregon this 23rd day of April, 1945, by receipt of a certified copy thereof.

HUGH L. BIGGS
Of Attorneys for Defendant.

[Endorsed]: Filed April 23, 1945 [55]

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

United States of America
District of Oregon—ss.

I, Lowell Mundorff, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages numbered from 1 to 56 inclusive, constitute the transcript of record upon the appeal from a judgment of said court in a cause therein numbered Civil 2373, in which E. H. Clarke Lumber Company, an Oregon corporation is defendant and appellant and

P. N. Kurth, is plaintiff and appellee; that said transcript has been prepared by me in accordance with the designations of contents of record on appeal filed by the appellant and appellee and in accordance with the rules of Court; that I have compared the foregoing transcript of the record and proceedings had in said court in said cause, in accordance with the said resignations, as the same appear of record and on file at my office and in my custody.

I further certify that the cost of filing notice of appeal is $5.00 and comparing and certifying the within transcript is $17.90 for appellant and for filing notice of cross-appeal is $5.00 and for comparing and certifying transcript is $18.90 for cross-appellant and that the same has been paid.

I further certify that I have enclosed transcript of the testimony taken in this cause together with original order extending time for defendant to file and docket appeal from April 12, 1945 to and including May 2, 1945.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court in Portland, in said District, this 25th day of April, 1945.

[Seal] LOWELL MUNDORFF,
Clerk
By F. L. BUCK
Chief Deputy [56]

In the District Court of the United States
For the District of Oregon

Civil No. 2373.

P. N. KURTH,

Plaintiff,

vs.

E. H. CLARKE LUMBER COMPANY,
an Oregon corporation,

Defendant.

TRANSCRIPT OF EVIDENCE AND ARGUMENTS

November 24, 1944
December 8, 1944
December 26, 1944

INDEX

PLAINTIFF'S EVIDENCE

ARGUMENTS

INDEX

[Title of District Court and Cause.]

Portland, Oregon, Friday, November 24, 1944
10:20 o'clock A.M.

Before: Honorable Claude McColloch, Judge.

Appearances:

Messrs. Carl D. Etling and Bruce Cameron, Attorneys for the Plaintiff.

Messrs. R. R. Morris, David L. Davies and Hugh L. Biggs, Attorneys for the Defendant.

TRANSCRIPT

The Court: Now Mr. Etling, we are ready.

Mr. Etling: If the Court please, according to the pre-trial order——

The Court: I haven't seen anything about a pre-trial order. I just came by and spoke to Judge Fee and he told me his recollection was there was a pre-trial.

Mr. Biggs: I think I have an extra copy here, your Honor.

The Court: Was there a pre-trial transcript?

Mr. Etling: No, your Honor.

Mr. Biggs: No transcript.

The Court: Well, on such an important matter a transcript should be made of what was said at the pre-trial.

Mr. Etling: I don't believe it was.

The Court: What do you think it is, then, with-

out my reading the order? It is a submission of a statement of facts here?

Mr. Biggs: Yes, your Honor, largely so. There is one point of testimony.

The Court: Does it call for testimony?

Mr. Biggs: Just a little bit. I think Mr. Etling wants to prove the residence of his client.

The Court: Go on now. Is this, from your point of view, a final submission?

Mr. Etling: This is the trial.

The Court: All right. Better put on the testimony then.

Mr. Etling: As I see it, there are just two issues; whether Chapter 265, Oregon Laws, 1943, as set out in the pre-trial order, is a bar to the maintenance of this action, and the other is since about October, 1942, plaintiff has been and now is a resident and citizen of the State of Washington. [2*]

We will call Mr. Kurth.

P. N. KURTH,

the plaintiff, was thereupon produced as a witness in his own behalf and, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Etling:

Q. Will you state your name, please?

A. P. N. Kurth.

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*Page numbering appearing at top of page of original certified Transcript.

(Testimony of P. N. Kurth.)

Q. And are you the plaintiff in the case of P. N. Kurth v Clarke Lumber Company, No. Civil 2373?

A. Yes, sir.

Q. And where do you live, Mr. Kurth?

A. Vancouver, Washington.

Q. And what is your occupation?

A. Truck driver now.

Q. I beg pardon? A. Truck driver.

Q. Were you formerly employed by the defendant in this case, the Clarke Lumber Company, at Sweet Home, Oregon? A. Yes, sir.

Q. And in what capacity were you employed by the defendant? A. Fireman and engineer.

Q. Fireman and engineer?

A. Yes, sir. [3]

Q. During what dates were you employed by the defendant?

A. From about October, 1940, to September, 1942.

Q. And in this connection you are making a claim against defendant for overtime wages under the Fair Labor Standards Act of August, '38?

A. Yes, sir.

Q. And are you asserting this claim for wages earned? You are asserting this claim for wages during what date?

A. From about July, 1941, to September, 1942.

Q. Now during the time you worked for the defendant in its mill at Sweet Home, Oregon, where did you live? A. At Sweet Home.

(Testimony of P. N. Kurth.)

Q. And did you move from Sweet Home subsequently? A. Yes, sir.

Q. And when did you move?

A. September, 1942.

Q. And where did you go? A. Portland.

Q. To Portland. How long did you live in Portland? A. About a month.

Q. And did you leave Portland?

A. Yes, sir.

Q. Where did you go?

A. Vancouver, Washington.

Q. Now when did you move from Portland, Oregon to Vancouver, [4] Washington?

A. It was——

Q. Just approximately what month?

A. The first part of October, I think.

Q. The first part of October, 1942?

A. Yes, sir.

Q. Have you lived anywhere else since you moved to Vancouver, Washington?

A. No, sir.

Q. Until the present time?

A. No, sir.

Q. Do you have a family? A. Yes, sir.

Q. And did your family move with you to Washington? A. Yes, sir.

Q. When you moved to Vancouver, Washington, from Oregon, was it your intention to acquire a new residence and domicile? A. Yes, sir.

Q. And do you own your home there?

A. Yes, sir.

(Testimony of P. N. Kurth.)

Q. Did you own your home there prior to moving there? A. No, sir.

Q. You purchased a home? A. Yes.

The Court: When did he purchase it? [5]

Mr. Etling: Q. When did you purchase your home in Washington?

A. Along about November, 1942.

Q. Now what is the address of the home you purchased?

The Court: That is all you need to show.

A. Route 4, Box 208.

The Court: Cross examine.

Mr. Etling: There is one more point I want to bring out, your Honor.

The Court: What is it?

Mr. Etling: Q. That is, did the plaintiff have any actual knowledge whatsoever, either before or at the time he filed this action, that the 1943 Oregon Legislature had passed a law, Chapter 265, Oregon Laws, 1943, imposing a statute of limitations on actions for overtime pay?

Mr. Biggs: We will object to that for the purpose of the record, if the Court please, on the ground it is immaterial.

The Court: He may answer, subject to the objection. Answer. Did you know? Did you know about this law?

A. No, sir.

The Court: Did you, Mr. Etling?

Mr. Etling: No, I didn't.

The Court: Cross examine.

(Testimony of P. N. Kurth.)

Cross Examination

By Mr. Biggs: [6]

Q. By whom are you employed as truck driver, Mr. Kurth?

A. Vancouver Housing Authority.

Q. Vancouver Housing Authority?

A. Yes, sir.

Q. And for how long?

A. The last two years.

Q. Ever since you have been in Vancouver?

A. Yes, sir.

Q. You have been employed by the Housing Authority?

The Court: Do you intend to contest diversity of citizenship?

Mr. Biggs: No, your Honor. I don't intend to contest the residence. I just want to show any other facts that might be material.

Q. What area did you serve with your truck, Mr. Kurth?

A. The project they call Ogden Meadows.

Q. That is in Vancouver, is it?

A. On the outskirts.

Q. And were you required to haul material from Oregon? A. No, sir.

Q. Did you do any hauling from Oregon at all?

A. Not that I know of.

Q. I was just wondering if in connection with your business you had occasion to come over to Portland, and in and around Portland, during that period of two years? [7] A. No, sir.

(Testimony of P. N. Kurth.)

Q. Pardon me? A. No, sir.

Q. You did some of your trading, though, in Portland, I suppose? A. Yes, sir.

Q. And Vancouver is part of the Metropolitan Portland area, is it not? A. Yes, sir.

Q. You probably took Portland newspapers?

A. Yes, sir.

Mr. Biggs: That is all.

(Witness excused.)

The Court: Now you take half an hour and let the other side take a half an hour and see where we land, if you need a half hour.

Mr. Biggs: We may not need a half hour.

Mr. Etling: If the Court please, I would like to find out at this time whether or not the defendant is willing to stipulate on this matter of residence in order to simplify the record, and amend the pre-trial order?

The Court: Oh, I don't think we need to do that. He says he is not making any point of it, and the testimony is deemed adequate.

Mr. Etling: Now, your Honor has indicated you have already [8] read the briefs in this matter and I believe the briefs are quite complete on the subject and therefore I don't want to ask to read them, or anything of that sort——

The Court: Oh, yes. You have agreed on the merits in the claim?

Mr. Biggs: Yes, your Honor.

The Court: All right.

Mr. Etling: I may briefly outline the facts. This

action was commenced on February 10th, 1944, for Section 16(b) of the Fair Labor Standards Act of 1938 to recover overtime compensation, and an additional amount as liquidated damages and attorney fee, and for the convenience of the Court we have supplied a copy of the Fair Labor Standards Act.

The Court: What have you done about the attorney fee?

Mr. Etling: That question has been submitted to the Court as to the question of the reasonable attorney fee.

The Court: All right.

Mr. Etling: There is no sum agreed on. I might mention that in our original complaint we did not anticipate the sort of a case we ran into. We asked for $150. We filed an amended complaint asking for $250, but at that time in our computation began to increase, and I don't believe that is anywhere near a reasonable fee at this time, so it is submitted as an open question.

The Court: Look at the reputation if you win the case. [9]

Mr. Etling: The admitted facts are these, briefly: It is admitted by the plaintiff that plaintiff brings this action under the Fair Labor Standards Act and defendant corporation owning and operating the sawmill in Sweet Home, Oregon, for the manufacture of saw logs into lumber; that a substantial portion of said lumber is sold and shipped by means of railroad, and so forth, to various sources outside of the State of Oregon, and that de-

dendant was and now is engaged in commerce and the production of goods for commerce within the meaning of the Fair Labor Standards Act of 1938, and was and now is subject to all the terms and provisions thereof; and that plaintiff was employed by defendant in its said sawmill from about July, 1941, to September, 1942, and in connection therewith was engaged in commerce and the production of goods for commerce within the meaning of the Fair Labor Standards Act.

That on or about July 11, 1942, while still in the employ of the defendant, plaintiff filed a complaint with the United States Department of Labor, Wage and Hour Division, against the defendant regarding the wages due him, and the Wage and Hour Division made an investigation pursuant to that complaint. Upon the completion and termination of this investigation plaintiff's records were returned to him. He received them about October, 1943. That frequent admissions were made by and on behalf of plaintiff to the defendant—— [10]

The Court: You want to discuss that when your time comes, whether that is just extra statutory practice or whether that is provided by the statute or regulations. I am pointing to your side, Mr. Biggs.

Mr. Biggs: Yes, your Honor.

Mr. Etling: These demands were made on behalf of plaintiff to defendant during the time he worked for defendant and after he left defendant's employ, for the wages, terminating the demands

made on defendant by plaintiff's attorney in about November, 1943. And, as I before stated, it is agreed that if the Court should find that plaintiff should prevail on the issues presented, judgment should be entered in his favor in the sum of $426.38 and for the reasonable attorneys' fees, and I have before stated the issues.

Now defendant's contentions in this matter are based solely on this Chapter 265, Oregon Laws, 1943, and which I will read just for the sake of my argument:

"Recovery for overtime or premium pay accrued or accruing, including penalties thereunder, required or authorized by any statute, shall be limited to such pay or penalties for work performed within six months immediately preceding the institution of any action or suit in any court for the recovery thereof; provided, that an action may be maintained within a period of ninety days after the effective date of this Act on claims heretofore accrued." **[11]**

And this law carried an emergency clause and became effective on the day of its pasage, March 10th, 1943.

The plaintiff was a resident of Oregon during all times he worked for the defendant.

Prior to the passage of this Act the statute of limitations in Oregon was six years.

Now it is our contentions that there are three points involved here. First, that this Oregon law has no application to the plaintiff in this case, brought under the Fair Labor Standards Act; and, two, as construed and applied by the defendant,

that this Oregon law is unconstitutional and void; and, third, if the Court should find that this Oregon law is applicable, then that it is unreasonable and, therefore, unconstitutional on its face because it violates the Fourteenth Amendment, in that it deprives plaintiff of his property without due process of law, and it denies him the equal protection of the laws.

The Court: You just said the six-year statute was applicable, so if the six-year statute was applicable why, if it is constitutional, wouldn't the six-months statute be applicable?

Mr. Etling: Because it is unreasonable, your Honor.

The Court: Well, you just go around the barn when you concede that. I said that when you concede it is unconstitutional.

Mr. Etling: I see. And consequently that it is unconstitu- [12] tional, because it discriminates against a Federal statute, the Federal Labor Standards Act, and, therefore, violates Article 6 of the United States Constitution; and, three, that it violates Article 1, Section 10 of the United Staes Constitution, in that it impairs the obligations of contracts in existence between the parties prior to the passage of the Constitution; and, four, that it violates Article 1, Section 8 of the United States Constitution, in that it interferes with the regulation of interstate commerce, a field already occupied by Congress.

Now under the first point, the applicability, the defendant of course is relying on the Rules and

Decisions Act, and the Rules and Decisions Act is inapplicable to state legislation which is discriminately against rights established by Federal statute, but I have said before, this Oregon law was passed as an emergency legislation. The records of the District Court of the United States for the District of Oregon, and the records of the Circuit Court of the State of Oregon, including all thirty-six counties,—and that court has current jurisdiction of matters arising under the Fair Labor Standards Act,—During the year immediately following the passage of the Act—two years, a year preceding and a year following — twenty-eight cases involving claims for overtime pay were filed in these two courts. Only one of those cases was attempted to be brought under the [13] state statute, and that case was still out of court, so that case did not establish, and we have been unable to find any other cases establishing, that there is such a thing as a civil remedy for overtime pay under the Oregon statutes.

The Court: I should think you would have to prove that if you wanted me to consider it—data like that.

Mr. Etling: We have submitted the data in our brief, your Honor.

The Court: I know, but——

Mr. Etling: We ask the Court to take judicial knowledge.

The Court: I don't think I could.

Mr. Etling: This matter was discussed in pre-

trial conference. At that time Judge Fee indicated that the Court would.

The Court: That just indicates again you should have had a transcript of the pre-trial conference.

Mr. Etling: We wanted at that time to produce testimony on that point. The Court said it was unnecessary.

The Court: Maybe so. All I said was, I wouldn't think so. I am willing to be enlightened on it.

Mr. Etling: Of course we are now bound by the pre-trial order.

The Court: The pre-trial order does not say anything about that.

Mr. Etling: Well, may we call testimony on that point? [14]

The Court: Pass it for the present. I just mentioned it as we went by. If you rely on it heavily, I thought we ought to raise the point as you went by.

Mr. Etling: As I say, we have been unable to find any state statute providing a civil remedy, and the defendants have cited only one case, and that is the criminal case of Bunting v. Oregon, so they haven't been able to find any cases either where there has ever been a civil remedy for overtime pay under the Oregon statutes.

The Court: Well, there have been lots of cases filed in the Circuit Court. We all know that of our own experience. I have known that myself.

Mr. Etling: We have been unable to——

The Court: Well, that would be a very difficult matter to run down, especially going back over a period of time. Unless they have it gathered statistically someplace that would be very hard to find.

Mr. Etling: At the time we prepared that brief we didn't rely on these statistics. We also relied on the Automotive Trades Magazine, which stated that they, the Automotive Trades Union, joined with other interests in passing this statute of limitations.

The Court: I don't see how that is in the case, unless it is stipulated into the case.

Mr. Etling: I see. But since then—— [15]

The Court: What does the other side think about these current matters relied on?

Mr. Morris: If the Court please, during the pretrial, when it was presented to Judge Fee on some motion, the question of filing a so-called economic brief arose, but Mr. Etling raised the question that economic data could be relied upon in explaining the background, or the possible sources of evil at which the law was aimed should be proven. We then said, or at least I said that as I understood the law the economic matter need not be proven because its purpose is not to prove the existence of the facts but merely to state what the legislature reasonably might have had in mind when the law was passed.

So far as the trade journal of the automobile dealers is concerned, I don't know what effect would be given to it, but I do think that either Mr. Etling or we are entitled to put in such economic data as we see fit, or which might lend some light on the subject matter, and it is not necessary to put it in evidence because we are not doubting the truth of those facts but only obtaining background.

Mr. Etling: Now as I say, at that time it appeared as though the defendant might make a point of that, but I believe in their brief they practically —it is my belief that they practically concede that the Oregon statute was passed and was intended to apply to the Fair Labor Standards Act—in- [16] tended to curtail it.

The Court: Well, I would be surprised if they would concede that.

Mr. Biggs: No, we don't concede that, your Honor. We concede that it applies and that the statute was drawn to bring it within its purview, together with any other statutes providing any other time for bringing suits, including our own Oregon statutes that so provide. We do not thing that it was intended to discriminate against the Federal Act or that the Federal Act was its purpose.

Mr. Etling: We didn't intend to go that far. We have cited some cases, your Honor, on the applicability, such as Campbell v. Haverhill, which we consider a leading case on this matter, and in that case the application of the local statute of limitations to a patent infringement action instituted in the Federal Court was in question. It was contended that the lex fori can only apply to those matters within the jurisdiction of the state courts, and since at that time an action for patent infringement was enforceable only in the Federal Courts, the defendant argued that the Federal Courts were not bound to follow the local statute of limitations, since the state had neither the power to create the right nor the power to enforce the remedy.

The Court said: "Doubtless such an argument would apply with peculiar emphasis to statutes, if any such existed, [17] discriminating against causes of action enforceable only in the Federal Courts; as if they should apply a limitation of a year to actions for the infringement of patents, while the ordinary limitation of six years was applied to all other actions of tort."

And the Court went on to say subsequently, "it may be well questioned whether there is any sound distinction in principle between cases where the jurisdiction is concurrent and those where it is exclusive in the Federal Courts". The Court's reasoning is equally applicable to a statute of limitations, such as the Oregon statute, which discriminates against Federal rights under Section 16(b) of the Fair Labor Standards Act, in which cases the State and Federal Courts have concurrent jurisdiction, such as the case we have here.

Now from page 7 to page 15 of our brief we have cited quite a number of cases, and we have gone into the administration of the Fair Labor Standards Act, and to show the Court what a difficult matter, what a complicated matter it is for the Administrator to carry on, making these investigations, such as was made in this particular case. It is necessary to determine what is interstate commerce, whether the parties are within the Act, are engaged in interstate commerce; and I won't attempt to enlarge on that any further. I will submit that on the brief, for the reason that it would take me too much time. [18]

The Court: That is one thing I can take judicial notice of.

Mr. Etling: The Supreme Court prescribed activities as difficult as squaring a circle in the Kirschbaum v. Walling's case. I will mention the recent case of Addison v. Holly Hill, which was decided by the Supreme Court on June 5th, 1944, relating to the question of exemptions under Section 13(a)(10) as affected by the definition of the Administrator as to the "area of production". The Court said:

"And so Congress left the boundary-making to the experienced and informed judgment of the Administrator. Thereby Congress gave the Administrator appropriate discretion to assess all the factors relevant to the subject matter, that is the fixing of minimum wages and minimum hours."

And in disposing of the case the Court said: "It is our view that the case should be remanded to the District Court with instructions to hold it until the Administrator, by making a valid determination of the area of production with all deliberate speed, acts within the authority given him by Congress."

That is an example of how the Supreme Court has attempted to work with the Administrator in determining these matters that have been presented to that adminstrative body, and, as we have pointed out in other cases also, the courts are reluctant to interfere with administrative processes. [19]

Persons are encouraged to exhaust their remedies before administrative tribunals, before coming to the Court.

The Court: And sometimes exhaust themselves.

Mr. Etling: Now they have cited the case of Order of Railroad Telegraphers v. Railway Express Agency, decided by the Court February 28th, 1944. Now that case arose before the Railroad Adjustment Board and we are well aware of the fact that there is a difference. The Railroad Adjustment Board has broader powers, but, nevertheless, it is an administrative agency. In that case the Court said:

"It is difficult to see how state statutes of limitations can restrict the power of the Federal Administrative tribunal to consider and adjust claims."

And in that case the Court goes further in discussing the question of the statute of limitations. It says:

"Statutes of limitation, like the equitable doctrine of laches, in their conclusive effects are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared."

The Court: Just pardon an interruption. You and I had a case one time, Mr. Biggs, that had something to do with that Railroad Board.

Mr. Biggs: Rogers v. Union Pacific.

The Court: And you no doubt remember this case he is talking from now? [20]

Mr. Biggs: Yes, sir, I do.

The Court: I suppose there was some proceeding like Rogers' that was being presented to the Board and the claim was the state statute of limitations barred it. Was that it?

Mr. Biggs: That was correct, your Honor. There was just this distinction, however: In the Telegraphers' case, if your Honor recalls, the Railroad Adjustment Act provides for submission of the case to the Adjustment Board, and when the award is then rendered by the Board he has a period of two years in which to bring his action on the award, and that is what the proceeding was in this Telegraphers' case. His time was gone under the state statute, but he had brought himself under the procedure of the Railroad Adjustment Act.

The Court: That is the two years?

Mr. Biggs: That is the two years, and the Court said, of course, the statute of limitations under the Railroad Adjustment Act applies and not the state statute.

The Court: That is what you meant someplace in your objection, when you said there could be a statute of limitations——

Mr. Biggs: Passed by Congress.

The Court: —written into this Wages and Hours Act?

Mr. Biggs: By Congress, yes.

The Court: But there is none?

Mr. Biggs: There is none.

Mr. Etling: And ordinarily it is covered by applicable state [21] statute. In this Telegraphers' case, as the Court noticed, the statute of limitations was six years; and even there where the matter was being pursued the Supreme Court refused to apply it. Now in this case it certainly can't be said that the defendant wasn't apprised of the fact

that the plaintiff was making a claim because his remedy was being pursued.

The Court: Better watch your time. Six or seven minutes more. I am not going to cut you off this morning but I wanted to get started.

Mr. Etling: Yes. Now on this question of non-residence, I cited the case of Adams & Freese v. Kenoyer in the brief, and that case, as far as non-residence is concerned, is analogous to the case before us. The Court, in considering whether the period allowed by state statute of limitations was reasonable and applicable to rights already accrued, entitling mortgagees to foreclose a mortgage, states:

"Whether the legislature, in fixing such time, makes it so short that the right to sue is practically denied, Courts will declare such time unreasonable, and refuse to enforce the law."

The mortgagees in this case, on the date of the execution of the note and mortgage, were residents of North Dakota, but prior to the enactment of the statute of limitations moved to Missouri, the same as the case we had here, where they have ever since resided, and in further consider- [22] ing the non-residence of the mortgagees, the Court stated:

"In considering the validity of such a statute when applied to existing causes of action, it is both just and reasonable to assume what we all know to be true as a matter of common knowledge, that a large per cent of such persons, especially non-residents of the state, would not, in that short a period of time, acquire knowledge that such a vitally important statute to them had been enacted."

That is a further reason why the statute is inapplicable and unreasonable.

Now our second point is, as construed by defendant, applied in this case, that the Oregon law is unconstitutional and it is unconstitutional for the reasons that we have hereinafter set forth in our brief. If the Court should find, however, that it is applicable, then we contend that it is unconstitutional on its face for the following reasons:

First, that it deprives plaintiff of his property without due process of law—his property in the overtime pay that he was entitled to—and denies plaintiff equal protection of the laws.

In that regard this law affects the plaintiff differently than it would affect those who were working under contract. It would be subject to a six-year statute of limitations, whereas in this case plaintiff was subject to this 90-day statute, as far as he was concerned, and of course [23] it is claimed was accruing and it would be six months. And in that respect I also would like to just briefly state the effect of this Oregon statute.

The Court: You just made a remark that I want to repeat. You say if it was accruing it would be six months?

Mr. Etling: Yes.

The Court: Why do you think of that? It wasn't accruing?

Mr. Etling: Well, that is the language of the statute, your Honor.

The Court: Well, I know, but that is not in this case.

Mr. Etling: That is not this case, no.

The Court: No.

Mr. Etling: It is an accrued claim, was accrued at the time the statute was passed, and, therefore, if you are going to apply the statute it would have been outlawed June 10th, 1943, and that is the only phase of that statute that can be applied in this case. In the matter if this claim hadn't been filed in ten years we think it is unreasonable and unconstitutional; it is just as void as if the claim had not been filed for ten years; and certainly that statute can't be applied in such manner as to say that the accruing part of it would apply to the part that had accrued.

The Court: They indicate in the brief that it could be.

Mr. Etling: We dispute that, your Honor. And as far as the accruing part of this statute is concerned, the fact of it [24] is if a person quit working on July 1st, let us say, he would have to file immediately in the courts——

The Court: What are you talking about now—the accruing part?

Mr. Etling: Talking about the accruing part.

The Court: You don't need to talk about that, unless I change my mind about the question before me.

Mr. Etling: I see. I will submit our argument on due process on the brief. I cited a number of cases. One of the leading cases seems to be Lamb v. Powder River Livestock Company. That was a decision by Justice Van Devanter when he was on

the lower court. In that case of course he discusses the question of reasonableness. If the statute is reasonable it is constitutional; if it is unreasonable it is unconstitutional; and he enumerates several reasons, such as in this case if it is unreasonable it is unconstitutional for all the reasons we have mentioned here.

As to the question of reasonableness, the Court said in that leading case, "A single period cannot be fixed for all cases because what would be reasonable in one class of cases would be entirely unreasonable in another."

And there are a number of cases cited by the defendant in this matter, but the question of reasonableness will have to be determined in each individual case on the facts. [25]

Now we submit this question of discrimination against a Federal statute in violation of Article 6 of the United States Constitution. We submit that on the brief, submitting a number of cases.

Then on the question of impairment of obligations of contracts, again we have the leading case of Lamb v. Powder River Livestock Company, and in that case I believe a six-year statute of limitations was reduced to ninety days. In that case the Court said, regarding this point:

"But any statute which denies, unreasonably restricts, or oppressively burdens the exercise of a right of action springing from a prior contract, impairs its obligation within the prohibition of the Constitution. Article I, Section 10."

"A subsequent law of a state which denies or di-

minishes the right of the one or excuses or discharges the other from the performance of his duty impairs the obligation of the contract, although professing to act only upon the remedy."

The Court: Your time won't permit you now to read from the cases. Just finish your points now of the argument.

Mr. Etling: All right, sir. The final point is that the Oregon statute interferes with the power of Congress to regulate commerce among the several states in a field already occupied by Congress, and we submit on our authorities that this conflict, this particular conflict had been occupied, and that the state [26] statute then in question unreasonably interfered with this normal operation of the Fair Labor Standards Act, which is based on Interstate Commerce and the production of goods for interstate commerce and, therefore, is unconstitutional.

Mr. Morris: If the Court please, without repetition, as best we can, Mr. Biggs and I have divided the field, as he, Mr. Biggs will deal primarily with the reasonableness of the statute, which to my mind is the controlling question. There are two lower court cases that should be called to your attention, one, I believe, by Judge Skipworth at Eugene, upholding this Oregon statute. We will furnish you with a copy of that decision. The other is a decision of the District Court of the United States in Iowa, in which an Iowa statute, reading that "In all cases wherein a claim of cause of action has arisen, or may arise, pursuant to the supervision of any Federal Statute wherein no period of limita-

tion is prescribed", then a six-months statute is imposed.

I want to call to your attention, however, the fact that the Iowa statute is applicable only to causes of action arising under Federal Statute and has no bearing at all on common law, state or statutory causes of action.

The Court: How old is the Iowa statute?

Mr. Morris: Passed in 1943, I believe. This case is of comparatively recent vintage. It was within the last six weeks, I believe. [27]

The Court: Well, is there a decision in the case?

Mr. Morris: There has been a decision. I have been unable to find out what the decision is.

The Court: The statute is being attacked?

Mr. Morris: The statute is being attacked. In the District Court the statute was held unconstitutional.

The Court: What?

Mr. Morris: In the District Court of Iowa the statute was held unconstitutional.

The Court: The United States District Court?

Mr. Morris: Yes, sir.

The Court: In some wage and hours claim?

Mr. Morris: Yes, sir; and the case of overtime under the Fair Labor Standards Act.

The Court: But you haven't a copy of that decision?

Mr. Morris: I have written to get a copy, and the Judge gave an oral decision and it is not reported. I wrote the attorneys asking for the basis of the opinion and this is what the attorney for the

company then said: The basis of the ruling was, or it was admitted by the legislature of the State of Iowa to place a limitation on all Federal actions.

We wrote also to the Bureau of National Affairs, which published the report of the decision, and the Bureau advised us that the judge held the Iowa Act unconstitutional because it was an attempt by the state to amend an Act of [28] Congress. Other than that we can get no information as to the basis of the decision.

The Court: Do you remember the name of the judge?

Mr. Morris: Judge Dewey.

The Court: Is the case being appealed?

Mr. Morris: I do not have that information.

The Court. All right.

Mr. Morris: The letter from the company, or the General Counsel of the company, leads me to believe that the case will not be appealed. As we look at this case, your Honor, there is only one question involved, and that is the determination of a reasonable period of time. The arguments, the various constitutional grounds that have been raised, equal protection of the laws, due process, and in all of those instances the question resolves itself around the further issue whether the statute allows a reasonable period.

The Court: Have similar statutes been enacted in recent years in other states?

Mr. Morris: My understanding is a few other states, following the lead of the Oregon Legislature, enacted similar statutes, yes.

The Court: Following the lead of Oregon?

Mr. Morris: Yes. I think the Oregon statute was one of the first, if not the first.

Plaintiff contends, first, that the Oregon statute [29] must apply only to the Fair Labor Standards Act, because there is no Oregon law giving full remedy to an employee for the recovery of overtime. We are in sharp disagreement upon that issue. There are two main Oregon statutes giving overtime to employees working in excess of either the number of hours prescribed by the legislature or by the State Wage and Hour Commission. There is one statute applicable to overtime work in mills, mines, and so on. Then there is a statute requiring the Wage and Hour Commission to fix wages and hours for working in unhealthy conditions for women and children. The constitutionality of the Oregon statute was upheld, as we all know, in the Bunting case. In that case in the state court, in considering a provision permitting three hours of overtime per day on condition that time and one-half be paid, the Oregon court referring to the three-hour provision said this penalty also goes to the employee in case the employer avails himself of the overtime clause. Well, we take it that is a clear reference by the Oregon court to the right of the employee to the time and one-half.

Furthermore, in Sumpter v. St. Helens Creosoting Company, 84 Ore. 167, which is not cited in our brief, the Court recognizes the right of an employee who has worked overtime under the statute to get time and one-half and to bring an action in his own

name. However, in that case the Court did hold that accord and satisfaction was a complete defense; [30] that the right of the individual to bring the suit was recognized.

As to the orders of the Wage and Hour Commission the Oregon Code itself carries a provision that a woman who is not paid the minimum required by the Wage and Hour Commission may maintain an action to recover the wage and to recover attorney's fees. It is our view when the Wage and Hour Commission prescribes a minimum of time and one-half for work performed after a certain number of hours, the time and one-half becomes part of the minimum wage contemplated by the statute, and then the provision of the Code permitting the action to be brought by the individual. So as a matter of fact, the Oregon law is not aimed at the Federal Statute, and there are also in existence Oregon statutes creating rights of action for overtime.

The Court: What was the case before Judge Skipworth? Was it a straight case raising the six-months question?

Mr. Morris: That case was a case brought for overtime under the Federal Act, in which the same statute was pleaded as a defense.

The Court: Was it an accruing claim?

Mr. Morris: No, sir. It had accrued prior to the enactment of the law.

The Court: He upheld the 90-day clause?

Mr. Morris: Yes, sir.

The Court: Straight up, did he? [31]

Mr. Morris: Yes, sir. The question was raised and he held in favor of the defendant.

The Court: Is that case being appealed?

Mr. Morris: I do not know. Perhaps. I assume it probably will be, but I have no first-hand knowledge it will be appealed. Mr. Riddlesbarger, however, the attorney for the defendant in that case, is here, so he perhaps knows whether it will be.

Mr. Riddlesbarger: I was told once by the attorney for the plaintiff that it would be appealed and we could rely on it, but I know the attorney and he does not say sometimes what he means, so I would not be certain.

Mr. Morris: There is a substantial amount of money involved in that case, your Honor. I think the claims aggregate in excess of $12,000.

The Court: Who is the defendant in the case?

Mr. Morris: There were three, Watts, Lamm, and one other—perhaps some others—a copartnership. The case is Fullerton v. Lamm, Watts & Lamm, Copartners, doing business as the Deschutes Lumber Company.

The Court: Oh.

Mr. Morris: Here is a copy of the opinion in that case (passing paper to the Court).

The Court: Go ahead, Mr. Morris.

Mr. Morris: There are one or two other, what I consider minor points, raised by the plaintiff, which I will attempt to [32] dispose of before turning it over to Mr. Biggs. One contention is that equal protection of the laws clause is violated, inasmuch

as this statute relates only to a statutory cause of action rather than common law or contractual causes of action. The adoption of plaintiff's argument will settle that to a judgment in favor of the defendants, for this reason: All causes of action for overtime, both under the Fair Labor Standards Act and the state laws, are statutory, and if the statute of limitations act is susceptible to the attack of improper classification the same attack may be made upon the basic statutes upon which plaintiff relies. If the legislature has the power, either state or Federal, to pass a law creating a right for overtime, and that law be constitutional and not discriminatory, these same legislative bodies have a like power to pass a statute of limitations and it also would be subjected to the attack of limitation. The commerce argument and the Constitution, the Supreme Court of the land, may be placed in the same category. Clearly if Congress had imposed a statute of limitations for actions under the Fair Labor Standards Act two years, three years, or any period, the state law would have never had actions brought under the Federal law.

The plaintiff admits that Congress had not preempted the field, depriving a state of the power to enact such legislation, because in Footnote 4, on page 3 of his brief, he [33] states what we consider to be a correct statement of the law:

"No period of limitations is prescribed by the Fair Labor Standards Act for suits brought by employees under Section 16 (b) of the Act; therefore, this matter is governed by applicable, valid state law."

So the fact that a state law has been passed, which is his position here, is not an invasion by the state, either of the commerce power or the supremacy of the Federal Constitution. The question still remains, Is the law constitutional or is it unconstitutional, because of other grounds urged by the plaintiff, not because it relates to interstate commerce or because the Federal Constitution is in existence?

The Court: Well, your argument would be that whatever might be said about it as to unreasonableness pertaining to a Federal claim could likewise be said about it for unreasonableness pertaining to a claim arising under the state law. That is the point.

Mr. Morris: That is correct. But the point I was trying to make, your Honor, is, under the Rules and Decisions Act Congress has consented to the enactment of Federal laws applicable to state rights, so a conflict between the state law and the Federal Constitution is not here. The conflict would arise only if the Congress had enacted a statute of limitations but until Congress acts in that field there is no conflict.

The Court: I think you said the same thing in a different [34] way.

Mr. Morris: All right, sir. I don't intend to labor the point.

There is one further observation I would like to make, and with that I am through; and that is that the same troublesome questions arising under the Federal law also arise under the state law, and that is the determination of what is hours worked?

Who are employees? What is interstate commerce? What is inter or intrastate commerce? The difficulties of these are not confined only to Federal legislation; they are applicable to the state laws and rights under the state statutes. I don't think that Oregon has had the troublesome administration under its own laws that we have had under the Federal laws with problems there.

Mr. Biggs: If it please the Court, the question of reasonableness seems to be more or less agreed to be the crux of the lawsuit and is important, but it is also a little difficult to demonstrate because it is so essentially a question of fact and judgment as exercised under the surrounding circumstances. I think it is not disputed by anyone here that the question of the reasonableness, or, that is, that the function of determination what is a reasonable time for the running of a statute of limitations, is essentially a legislative question. The Courts have, time after time, said that it is a policy-making matter and it is not a matter that Courts should seriously concern [35] themselves with unless it can be demonstrated that the legislature in performing its function has committed palpable error, has acted capriciously or arbitrarily and in such a manner as to actually deprive an affected person of full opportunity to resort to the courts. So that the question is rather a narrow one when presented as a test to the constitutionality of an act. It is not exactly whether the Court, or the counsel, or the parties, or the administrative agency, or any other person or group of persons, might regard if it were

an open question, what would be a reasonable time. It is whether the legislature who is to be presumed to have fully considered the matter and to have wisely and fairly considered the matter, can be said as a matter of law not to have done that and to have acted unreasonably in fixing the particular period of the statute.

There are a number of cases cited in our brief, your Honor, in which the Supreme Court of the United States is on record to that effect. As I say, I think it has not seriously doubted the question in this case.

The question then that confronts your Honor is whether this particular statute of limitation which the Oregon Legislature has passed, making it applicable to the recovery of overtime or penalties accruing thereunder under any statute, Federal or state, present or prospective statute, is an unreasonable time under the circumstances. The presumption is, of course, that it is entirely reasonable. The burden is on the person [36] alleging the unconstitutionality of the Act to establish that it is unreasonable.

The argument of counsel didn't touch particularly on the question, and in his brief he has attacked it from that standpoint, solely on the basis that the complexities and the uncertainties, and the vexatious and intricate questions of law and fact which have been presented to the Courts under the Fair Labor Standards Act make it difficult for a person, an employee, to ascertain within ninety days, or six months, whichever the case may be,

whether or not in fact he is covered under the Act or whether he has a cause of action. Of course there is the well known, almost, and axiomatic rule of law applicable to that, and that is that if a person is not presumed to know the law, at least his ignorance of the law does not excuse him. It is to be presumed that he is aware of it and that his lack of compliance at least is not to be taken as an excuse for noncompliance.

The Court: Now in that connection I want to remind you, because I want you to look it up for me, of a holding probably ten years ago now by the Oregon Supreme Court about a statute that was passed by the Oregon Legislature containing an emergency clause affecting the practice question in the Oregon State Courts, and some Oregon lawyer not knowing about it, because, as we all know, our Session Laws are not published until late in the summer, or later sometimes, and not picking it up any- [37] where else he found himself in a bad position because he failed to do something within the time as required by that amended statute.

It seems to me the opinion of the Oregon Supreme Court was written by Justice Rand, who was then alive. That is the question that I wanted you mainly to discuss here, when you get around to it, the 90-day clause, because it seems to me that is all that I am dealing with, and the full time of a 90-day clause with the emergency clause attached; in other words, dating the ninety days, not after the end of the legislature but the effective date of

the Oregon statute, thus giving the public information about a chance to be appraised by the publication about what the legislature has done, and conversely denying to the public and to the profession, of necessity, from general knowledge anyhow, of what has been done by the Legislature in those cases where the emergency clause was attached.

Mr. Biggs: Yes. I am not familiar with the——

The Court: I think when you find the decision that I have in mind—when I came by I asked Judge Fee if he could guide me to it. He remembered it generally but neither one of us had a very definite recollection.

Mr. Biggs: I don't recall that, your Honor, but we will make every attempt to look up that case. I was just going to say that the practical answer to the question is this: I am [38] speaking generally now of limitation periods, not the 90-day period. If the uncertainties of the law themselves, and the necessity for new interpretations, or at least the process of looking into it, were to be considered a defense of any, or a ground for overturning the statute of limitations, there never would be any opportunity to set up a statute of limitations, because the law itself in many fields is uncertain and continues to be until it is adjudicated. That is true of this Act. If you say wait until the Act has been completely adjudicated and all the problems solved before a man is required to sue under it, that time might never come. I make that only as an argument now and I say, in answer

solely to the assertion of counsel, the position of counsel, that it is unreasonable because of its application to the Fair Labor Standards Act and because of the uncertainties and complexities of the Fair Labor Standards Act.

Our position is pretty well developed in our brief on that, your Honor, and we have developed two reasons which we think might well have motivated the legislature in classifying legislation of this type for a special statute of limitations in determining the proper period to be the periods adopted.

Now as to the 90-day limitation, and particularly with reference to what counsel has had to say about that, he has based, as I say, his whole case on the fact it is difficult [39] to know what your rights are under the Fair Labor Standards Act, and, therefore, as to that Act the statute is not applicable, or is unconstitutional. The fact of the matter is the Act has been in effect about four and a half years before the Oregon statute was passed. The men knew pretty well by that time, and certainly this plaintiff, that by admission in the pretrial order, whether he had a claim or didn't have a claim, whether it was going to be paid or was not going to be paid, whether there was a controversy about it, so there was no necessity for all the investigation for uncertainties counsel speaks about in this case.

It is true when the statute was passed the saving clause of ninety days was provided, and the emergency clause put the Act immediately into effect, so the ninety days started running in March, 1943.

The question then is, whether ninety days afforded adequate opportunity, or a reasonable opportunity, to employees affected by the Act to resort to the courts for the purpose of determining their claim.

The Court: Without publication?

Mr. Biggs: Yes, without publication, your Honor. As to that I don't know exactly when the session laws were published but it was probably in June or July. We can't know precisely what information employees had but we do know this—and I think the Court almost could take judicial notice of the fact that the unions were present at the legislature and were advised [40] of what was being done—these bills were rather widely circulated, even before they were published in volume form. The Wage and Hour Administration through its representatives of course, no doubt, was keeping very close tab on the progress of the bill. The newspapers undoubtedly carried some reference to it. Customarily they do publish the bills even before they are passed.

The Court: I never heard of it myself until the case was referred to me the other day.

Mr. Biggs: I appreciate that, and the plaintiff in this case has said that, too. I believe that he doesn't know, and his attorneys has, so we will have to argue the matter, I suppose, from general principles and not as to how it applies to the particular plaintiff in this case.

The Court: Now you may tell me something more about that. Was this a controverted measure?

Mr. Biggs: I understood there were hearings on it. Could you answer that question?

Mr. Davies: Yes.

Mr. Biggs: Mr. Davies probably is more familiar with it than I am.

Mr. Davies: The matter was controverted in the legislature, and there were discussions pro and con. I don't remember the vote but there was a substantial vote on both sides.

The Court: Was it one of the high-lighted controversial [41] measures at that session?

Mr. Davies: I question whether I should say that, your Honor.

The Court: Who was the author of the bill, do you remember?

Mr. Davies: I am sorry, I don't remember that. We can easily supply that but I don't remember it.

The Court: All right.

Mr. Davies: I might say in this connection, for your Honor's information——

The Court: Was the vote close?

Mr. Davies: Not terrifically close. It seems to me in one house it was not close at all, and in the other house it was somewhat closer.

The Court: Were there large public meetings about it?

Mr. Davies: My information is that there was at least one public hearing, but I don't want to be precise about that because I haven't thought of that just recently.

The Court: And of course, let us say, the em-

ergency clause takes away the veto power, doesn't it, now? No, no, the veto power is not affected. Was this bill filed or approved by the Governor, does anybody happen to know?

Mr. Davies: It was approved by the Governor, and I might say in connection with this line of discussion, that the point was raised at the argument of the case before Judge Skipworth, by the attorney for the plaintiff, that he had only received [42] his copy of the 1943 Session Laws within I think a week or ten days before the Act became effective, and that he had had no knowledge of it, and that matter was fully discussed and argued before Judge Skipworth, and it was pointed out there, as Mr. Biggs has contended here, that the information was widely disseminated, and the mere fact it had not gotten to the attention of the particular plaintiff was not controlling.

The Court: You will find, I am sure, a good discussion of the dangers of legislative practice in the Rand decision—of the dangers of legislative practice of attaching emergency clauses to subjects affecting a whole lot of people.

Mr. Davies: For your information again, your Honor, I think you might know that in this very court there were filed a substantial number of cases within the ten-day period before the ninety days ran under this act, showing that the matter was widely known and they were filed also in other courts but there were a number of them in this very court, so that the information did get around very generally.

The Court: Now I must be excused for fifteen minutes and I will want to hear you further; and then you will get the same time.

Mr. Biggs: May we have a recess here?

The Court: Yes, for fifteen minutes. Before we recess, do you want to stand on your claim there about page 40 of your brief, that there is more than the 90-day clause involved in [43] this?

Mr. Biggs: Yes, your Honor, we think there is, and I will just briefly outline our position on that.

The Court: Yes.

Mr. Biggs: Our position on that is that, even though the 90-day limitation should be determined to be unconstitutional, the entire Act does not, as a result of that, fall. The plaintiff then would have a reasonable time within which to file his claim and the six months' limitation, if it is reasonable, is the time that would control, and we rely upon the case of Koshkonong v. Burton, in the United States Supreme Court, that is cited in our brief.

The Court: I have trouble in following that argument.

Mr. Biggs: All right. Perhaps I haven't stated my position clearly. Where the savings clause itself might be considered to be unreasonably short, that is the 90-day clause in this case——

The Court: Of course, your statute has special phrasing in it. It says—read it again.

Mr. Biggs: "Recovery for overtime or premium pay accrued or accruing, including penalties thereunder, required or authorized by any statute shall

be limited to such pay or penalties for work performed within six months immediately preceding the institution of any action or suit in any court for the recovery thereof; provided, that an action may be [44] maintained within a period of ninety days after the effective date of this Act on claims heretofore accrued."

The Court: Now then, just obliterate that proviso.

Mr. Biggs: All right.

The Court: The statute then says—ready it now, without that.

Mr. Biggs: The statute then says "Recovery for overtime or premium pay accrued or accruing, including penalties thereunder"——

The Court: Accrued or accruing?

Mr. Biggs: Yes.

The Court: Your argument then is——

Mr. Biggs: That it had accrued.

The Court: That it had accrued and he had six months?

Mr. Biggs: Yes.

The Court: If the 90-day clause fails?

Mr. Biggs: That is right, your Honor; if the 90-day clause fails. And that is my position in the matter, your Honor. I think that the Koshkonong case fairly construed stands for that principle. That was a case involving the right to sue on certain bond coupons. The period of time was very much longer, but when the application was first made——

The Court: That would be a pretty important

point to me, because I don't look with favor on it, with this midnight resolution, the way of doing business in the legislature, of [45] passing things in the way I classify this, in my own mind, about that emergency clause and the 90-day clause.

Mr. Biggs: During the recess, if the Court will permit me, we will see if we can run this down. Then we will get that Koshkonong case, too, because your Honor will want to run that down.

The Court: It is very important to me.

Mr. Biggs: Yes, your Honor.

The Court: All right. We will be back in fifteen minutes. We will continue the argument at the noon hour, I guess, rather than come back this afternoon. Is that agreeable?

Mr. Biggs: It will be fine with me, yes.

The Court: All right.

(Short recess.)

The Court: All right. Proceed.

Mr. Biggs: We were not able to find perhaps the case the Court had in mind. The case of Simpson v. Winegar involved a question similar to that. We didn't find any condemnatory language in the case. It refers to an option by Justice Rand. This opinion was rendered by Justice Burnett.

The Court: Oh, no. I am not thinking of anything that far back.

Mr. Biggs: 1927 is the date of it. It is more recent than that. We haven't had time then to run it down completely, your Honor. [46]

The Court: What is the one you have there?

Mr. Biggs: Simpson v. Winegar, 258 Pac. 562.

The Court: All right.

Mr. Biggs: The case I called your Honor's attention to just before recess was the cast of Koshkonong v. Burton, 104 U.S. 668, opinion by Justice Harland. In that case certain municipal bonds were issued in 1857, I believe. At that time the statute of limitations applicable was twenty years, both as to the bonds and the coupons. Subsequently, after the time had run for about fifteen years, in 1872, I believe it was, a new statute was passed, applying only to the coupons of the bonds and providing that no cause of action might be commenced thereon later than six years after the coupons had matured. Then there was a savings clause of one year, except as to those that had matured prior to that time. Since the coupons started maturing yearly a lot of them, in 1872, were matured. They had never been clipped from the bonds and no action ever brought on them, but the Court in the Koshkonong case determined that the obligation had accrued one year after the bonds were issued as to certain of the coupons and certain more the following year, and so on, so that in 1872, as to a considerable number of bonds the new statute would have run except for the saving clause of one year, and it was urged that saving clause of one year was an unreasonably short time within which to save rights and to bring actions on pending obliga- [47] tions.

The Court held, however, that it was not necessary to consider that question, whether it was too

short or not too short, and expressed no opinion on it. In view of the fact that the action was not brought until 1878, which was six years after the—eight years after the—no; 1880 was when the action was brought, which was eight years after the new statute had gone into effect, and said:

"We don't have to determine whether the savings clause is valid or not, because the time otherwise allowed as to coupons accruing after the new statute had gone into effect was six years, and since the plaintiff didn't bring his action within that six years' time, he is out in any event. That certainly is a reasonable time and we will adopt it as a reasonable time to determine. Even if we should hold the one year saving clause inapplicable, he still had proceeded within a reasonable time to bring his action."

And I think that case properly construed, or fairly construed, at least, stands for the proposition that if the savings clause is determined to be too short a time, then the time provided as to actions subsequently accruing by the new statute would be applicable by analogy. Therefore, reasoning from that case in this case, if the Court should determine that the 90-day limitation period was not a reasonable length of time, and, therefore, unconstitutional, it would be for the [48] Court, as we see it, to pass on the constitutionality of the six-month period, and if that is determined to be constitutional then it would be applicable to this cause of action and it would be barred, because the action wasn't actually commenced until—more than what?

Mr. Etling: More than a year.

Mr. Biggs: More than a year after the new statute had gone into effect?

Mr. Etling: No. It was eleven months.

Mr. Biggs: Eleven month, was it?

Mr. Etling: Yes.

Mr. Biggs: Eleven months before it was accrued; at least after the six-months period. That is one case we haven't found directly on that point. The language in a number of cases is, your Honor, if the savings clause is an unreasonably short length of time and no adequate provision has been made to save existing rights, then the person affected by it, whose rights have been cut off, will have a reasonable time thereafter to bring the action, and the Koshkonong case says that the time provided by the legislature as to the cause of action and their accruing is the test to be used. In that case then it would be the six-months period here.

There are annotations other than cases cited in our brief on the question of reasonableness of time, passing on statutes of varying length of time from thirty days to several [49] years. 49 A.L.R. 263, 120 A.L.R. 758. That is a good convenient collection of cases, as are most of those that we rely on.

I don't know what more can be submitted to your Honor, except as to the factors that might have been in the mind of the legislature and which probably controlled the legislature in adopting these periods of time.

Probably it is true, your Honor, that the administration of the Fair Labor Standards Act had

pointed the public's attention and the Legislature's attention to the justice, and frequently very grievous burdens that were imposed upon employers who suddenly were confronted with actions for overtime and penalty, or at least double overtime, where it was never anticipated either by the employer or the employee while the work was being performed, and then perhaps sometime afterward, and may have resulted from an interpretation of the Administrator of the Wage and Hour Division who, in making the interpretation, never realized that the particular situation had always been in the realm of uncertainty and not known either to the employer or employee. He himself may have delayed in passing upon the question until a great deal of time had passed and considerable obligations might have accrued under it. Then in making the determination the Administrator, recognizing that fact, would not make it retroactive but would make his interpretation simply prospective. Of course his conclusion on the matter [50] or his decision not to make the situation retroactive, would not cut off or bar any claims that any employees might want to assert under it, using the Administrator's interpretation as a persuasive factor in saying that the particular coverage contended for or the particular interpretation of the Act applied to that.

The Court: Do any of you know what is in the air throughout the country about the odd year Legislature coming in this January? Most legislatures, I think, like ours, meet in the odd years.

Mr. Biggs: No, I do not, your Honor. You mean on this particular question?

The Court: Whether legislation——

Mr. Biggs: Is contemplated?

The Court: —is being offered?

Mr. Morris: I know of one state, your Honor, on the Coast, or in this area, where of course the Legislature has not convened yet but statutes similar to these are in construction. We have been asked for a copy of the Oregon statute in certain instances.

The Court: Do you know whether there are many statutes like the Iowa one, fixing the statute of limitations for claims under a Federal Statute?

Mr. Morris: I was unable to find any.

Mr. Biggs: That would appear to be a clear ground of [51] distinction between the two statutes, the Oregon statute and the Iowa statute, then, since that applies solely to Federal Statutes. The Legislature, of course, is fixing the particular time here involved, were cognizant of the fact that in this state there are already many other statutes of limitations even than ninety days or sixty days, on lien foreclosures—some lien foreclosures as short a time as thirty days.

The Court: You are fictionizing now—bright lawyers have to—on what the Legislature might have thought of, had it thought.

Mr. Biggs: That is about the only way we can present the matter to your Honor. I think the Courts have sometimes invited us to do that.

The Court: Oh, yes.

Mr. Biggs: Because they said that if there is any fact that could have existed——

The Court: I know what the racket is—exceeding the legislative intent——

Mr. Biggs: That is right, your Honor.

The Court: —when no intent existed.

Mr. Biggs: There are those factors, though, and we have set them out pretty fully in our brief, that might influence, and indirectly did influence, the Legislature.

Mr. Biggs: There is another feature that might seem important under decisions of the Court. There is no way of [52] amicably adjusting controveries under this Act; that is, any binding enforceable way of enforcing the ordinary compromise or adjustment, is not binding on the parties, because they say the liability is fixed by the statute and neither the employee nor employer has the right to give it away, which is of course true under the Oregon statutes.

The Court: You mean settlements?

Mr. Biggs: Settlements; yes, your Honor. This kind of a situation arises——

The Court: I know about them. I know about the Federal. I don't know about any others. You say settlements are possible under the Oregon law?

Mr. Biggs: No. I think they contend they are not.

Mr. Morris: There are situations under the Oregon law, your Honor. Under the ten-hour law involving what the United States Supreme Court have held, accord and satisfaction is a bar, which

of course permits contractual settlement. Under the Wage and Hour Law, where the Commission fixes rules and fixes overtime, the statute provides the parties cannot contract away their rights.

Mr. Biggs: So it has arisen much more frequently under the Federal than under the Oregon statute, but it puts the parties at considerable disadvantage and indicates a sound public policy behind a short statute of limitation, behind a suitor who has in mind forcing the claimant to bring his action before too much time has gone by. There is no other way of disposing of it. An employee and employer cannot agree upon any matter in litigation. Nothing is gained by attempting to through the Wages and Hours Commisison, or attempting to compromise or effect a settlement themselves; so through the courts is the only way to get adjudication that is finally determined. Therefore, it is considered to be some public policy to promote the necessity for prompt action if litigation is contemplated.

The Court: Talking about legislative intent, what was said in Congress when the Wages and Hours Law was enacted as to why they didn't provide for a uniform statute of limitations? Anything?

Mr. Biggs: I don't know that anything was said then. My attention has not been called to that. Has yours?

Mr. Morris: No.

Mr. Biggs: I think that the matter wasn't even discussed. It is perfectly competent for Congress

at any time to do it, if they had in mind they wanted to do it, but I don't believe that question was discussed. I have already discussed the distinction between this kind of a case and a case arising under the Railroad Adjustment Act. I think the distinctions are clear. The Federal Employers' Liability Act of course has a statute of limitations.

The Court: It might not be a bad idea just to run over [54] our state statute of limitations generally. Direct claims, which are our main source of litigation, are two years, aren't they?

Mr. Biggs: Six years, as I remember.

The Court. And the catchall clause is one year, isn't it?

Mr. Biggs: I don't know that I know exactly what you mean by that.

The Court: A situation not provided for in this statute shall be one year.

Mr. Biggs: Ten years.

The Court: Ten years?

Mr. Morris: Yes.

Mr. Etling: I might mention in that regard, your Honor, the statute on penalties is three years, although this is not considered a penalty in this case, but a penalty is three years.

Mr. Biggs: That is, statutory penalties——

Mr. Etling: Yes.

Mr. Biggs: ——forfeitures, and so on? Then there are other periods of time. The period of time about real property is ten years; actions on ordinary contracts, express or implied, are six years; special

statutes relating to actions against sheriffs or public officials—what is that, one year?

Mr. Etling: Three.

Mr. Biggs: Is that three years? [55]

Mr. Etling: Yes, I think it is.

Mr. Biggs: Three years, and then special statutes in numerous instances relating to lien foreclosures, to suits to test the validity of certain elections, and so on, as short as thirty days. So that it is pretty hard to determine any public policy as to any particular period of time. That is, there is no way of averaging them up at all, or attaching any particular significance to any one or the other of them, except to say that the legislature, for reasons which appeared sufficient to them if they at the time determined as to this particular type of actions a particular time should be allowed, and this is what apparently they did do in this instance.

I haven't any other cases to call to your Honor's attention directly on the point that the Court suggested; that is, as to the situation if the statute of limitations—if the savings cause should be held unreasonable, except the Koshkonong case, and that would seem to throw it under the six-months period.

Mr. Davies: Could I say just a word? Since your Honor has indicated an interest in the legislative history, we will go back and refer to the calendar and give you the case. Mr. Riddlesbarger has called to my attention the fact that there was a move to reconsider this bill in—was it the Senate or the House, do you know?

(Mr. Riddlesbarger here consulted with Mr. Davies [56] in an undertone.)

Mr. Davies: In one of the houses, and it was reconsidered, and while the vote was somewhat closer than it was earlier, I mean while it was voted upon for reconsideration the vote was a little bit closer than it had been on the original passage. It was passed by a substantial majority in both houses. As I say, we will supply you with that in a supplemental statement. And on this matter of the——

The Court: I wonder why the emergency clause?

Mr. Davies: On that very point I was going to say——

The Court: To defeat a referendum, probably?

Mr. Davies: Possibly. I just don't know, but I remember that matter was discussed. I listened to the argument in the case before Judge Skipworth and I made a short argument there as a friend of the Court, and Mr. Riddlesbarger and Judge Harris handled the case, and he and I have been discussing a point which Judge Harris made there, which I will want to pursue a little further and attempt to locate the cases on which he relied, but I recall his stating to the Court, and him reading certain cases where there had been no savings clause, no emergency clause, and the Court had pointed out where you had no savings clause the period of time between the passage of the statute and the time that it became effective served some purpose, and he was thinking of the same point that is in your Honor's mind, I believe, and here

there was [57] a savings clause put in, I think in the circumstances, a good deal more reasonable time than might appear to your Honor at first blush. I think we have to bear in mind that when we are dealing with wage claims we are not dealing with a subject upon which a plaintiff is justified in sleeping on his rights. After all, a man gets his pay check every week, every two weeks or every month. There is outlined on it the basis of his compensation, and if there is any substantial basis on which he is entitled to more money the matter is called forcibly to his attention at that time, and I think there was a feeling as to any accrued claims. Certainly in weighing the possible difficulty to one future possible plaintiff, and the harassment of innumerable employers, it might well have weighed with the Legislature to say, "We think those people who have claims should bring them forward and get them settled," and certainly the matter was widely disseminated because I defended some of the cases that were brought before the statute ran.

The Court: Well, there is so much emphasis in the field of Oregon political affairs put on publicity and information to the voters, our voters' pamphlet; the fact that we have the initiative and referendum, which many states don't have; arguments may be made on the way they can be gotten out to the voters on initiative and referendum measures; but I don't think the average judge would like—I know Judge Rand didn't [58] like it when he came up against the facts. I am awfully sorry I can't be more definite about that case.

Mr. Davies: This wasn't a matter—I don't mean to split hairs with your Honor.

The Court: No.

Mr. Davies: But the statute actually became effective, I would say, a week or ten days after the Session Laws had been distributed. Now I grant that is not a long time but they actually were distributed a week or ten days before the 10th of June.

The Court: This emergency clause came along in March.

Mr. Davies: You say the savings clause?

The Court: I mean the savings clause.

Mr. Davies: Yes. The savings clause expired in June and a week or ten days before that the Session Laws had come out. I mention that because Mr. Lombard, the attorney for the plaintiff in the case before Judge Skipworth, said, "I have checked up the time I received my Session Laws and as near as I can tell it was not over a week or ten days before the bar let down"; and while that is not as long as three months, or a year, it actually was in the hands of the public that length of time, and the information about it in this instance was quite widely disseminated.

The Court: So that is the element of reasonableness that I am going to ponder over, that I am interested in—the [59] reasonableness of legislating that way.

Mr. Etling: If the Court please, there are just a few matters I would like to discuss. One, checking the House and Senate Journals on this matter,

I believe that they will show that this law was passed within a period of about two days and at the end of the legislative assembly in 1943.

The Court: That is when all the hot stuff goes through, if you have been around there, Mr. Etling.

Mr. Etling: No, I haven't.

The Court: Well, you stay away, if you possibly can.

Mr. Etling: And I have checked to some extent in the newspapers and I am unable to find particular publicity given this. I found one short article, about a half inch; I believe it was in the Oregonian; and also checking the minutes of the House and the Senate, I believe—checking the Journal, I believe, no minutes were taken on this particular bill. I don't know who sponsored the bill, do you?

Mr. Davies: I just don't know. We will supply that to your Honor, but just who introduced it I don't remember now.

The Court: I can make a good guess, but I won't.

Mr. Etling: Other than that, on the Fullerton case, which was decided before Judge Skipworth, I would like to point out that the Constitutional question was presented. However, the applicability was not presented. And then as far as this language of the Oregon statute is concerned, I believe that [60] the very language precludes the expression which Mr. Biggs contends for, that we are forced to rely on the six months' period. I believe the very language of the statute refutes that.

The Court: Well, you might speak a little more fully about that. The opening sentence of the Act says "accrued and accruing".

Mr. Etling: Yes, but going on and reading further, your Honor, "Recovery for overtime or premium pay accrued or accruing, including penalty thereunder, required or authorized by any statute shall be limited to such pay or penalties for work performed within six months immediately preceding the institution of any action or suit in any court for the recovery thereof; provided, that an action may be maintained within a period of ninety days after the effective date of this Act on claims heretofore accrued." We believe that precludes any such construction.

The Court: Yes, but he says cross that out, obliterate it, and find it unconstitutional. Then he says the rest of the statute still leaves a provision as to an accrued claim.

Mr. Etling: We deny that. Of course we have attacked the six-months statute also.

The Court: I understand. What do you deny? You say you deny that. It says "accrued and accruing".

Mr. Etling: I mean we deny that the six-months statute [61] can be——

The Court: How do you get away from "accrued and accruing", used in the body of the statute?

Mr. Etling: Well, I believe that the specific language at the last would control.

The Court: Well, what you mean is, you think

the Legislature, in passing the Act, thought that it would be accrued claims only in the last clause?

Mr. Etling: Yes.

The Court: But they are saying that to save the Act and—well, that is hardly correct.

Mr. Etling: I follow, your Honor.

The Court: No, you don't, because I got lost myself. There is no question about saving the Act, you said, and Mr. Davies just wants me to give weight to that word "accrued" in the body there.

Mr. Davies: That is correct, your Honor.

The Court: No question of saving the Act. If I struck down the 90-day clause you simply would not touch the six-months question.

Mr. Davies: That is correct, your Honor.

The Court: So I was in error when I started to say there was some question of saving the Act involved in order to get that construction. What you are asking me is to come with it to the word "accrued" in the body of the Act. [62]

Mr. Davies: And to apply the six-months limitation if the ninety days does not apply.

The Court: Yes, which means this: That every man who had an accrued claim had not only ninety days, he had six months. That is what your argument leads to. To give it to this man you would have to give it to everybody else.

Mr. Davies: That may be true, but if your Honor will read the Koshkonong case, to which we have referred in our brief, the point is the Koshkonong case says if your period of savings clause is unreasonably short, then as far as saving any

cause of action is concerned, he is limited to a reasonable time. Fairly considered, I think that is what the case means.

The Court: Even though nothing further had been said about saving existing causes of action other than——

Mr. Davies: Then you would be limited to a reasonable time, and to decide the reasonable time in that case would be the time fixed by the remainder of the statute, and by that process, as well as by the process of accrued and accruing I think you would arrive at the conclusion that six months would be controlling if the ninety days were stricken.

The Court: You don't mind these interruptions, do you, Mr. Etling?

Mr. Etling: No. That is quite all right. Finally, the defendant, in fixing——

The Court: I think there is a fallacy in your argument [63] but I can't find it right now, Mr. Etling. Don't sit down. You had better say what you think up, too, after you leave here.

Mr. Etling: I just felt that this accrued or accruing was sort of explanatory rather than of the whole Act. I don't see how you can take part of it away and make the rest hold. But I was going to finally say the defendant has finally, in their argument, invoked the rather vague presumption of constitutionality. We haven't said anything about that. We didn't have a chance to say anything about it in our opening brief, and we didn't file any reply on that point. I rather dispute that there is such a presumption and would like to state

these cases; U. S. v. Carolene Products Company, 304 U. S. 144, and Dartsmouth v. Woodward, 4 Wheaton 518, at 581 and 582; and those cases seem to hold that where specific Constitutional provisions come in conflict with this presumption it vanishes. However, I will say that if there is such a presumption we feel it is inconsequential. We feel we have overcome it.

The Court: Where do you get on a question like this: If six months is too short, what is the dead line, nine months, a year, eighteen months, two years?

Mr. Etling: The regular statute of limitations in this case we contend is six years.

The Court: I know that, but would you challenge a two-year [64] statute?

Mr. Etling: Well, I really haven't considered that.

The Court: You might as well. I am going to have to consider it and you might as well consider it. We are all in this together.

Mr. Etling: Perhaps a two-year statute would be——

The Court: Well, what is our guide?

Mr. Etling: I think we have contended to a considerable extent that ample time should be given to permit the Wage and Hour Division to make their investigations in this matter. Otherwise we feel that one of the most important functions of the Fair Labor Standards Act is frustrated.

The Court: They say in their argument that is administrative practice but should not be given

the weight you claim for it. They say in their brief as to that, that puts the state's policy as to limitations into the hands of an administrative body that could be inefficient and either understaffed or overstaffed and never get its work done, like the Interstate Commerce Commission is at the present time about bus and truck matters. Some things don't come to a certain head for several years.

Mr. Etling: Well, I do have this to say: That I think if the defendants want to fight the case out on those grounds, I think their battle is in Congress, not with the state legislature. [65]

The Court: Now in that connection the modern view, I believe, if I may put it that way, is that Federal Judges should be very slow to hold legislation unconstitutional. As soon as an unconstitutional question arises affecting Federal legislation we are supposed to call in two other judges and only three judges may sit. I think that is one of the modern statutes that has been passed to curb the United States District Judges.

Mr. Biggs: That is in injunction proceedings, your Honor?

The Court: Oh, I guess so. But certainly the modern tendency includes state legislation. We are under an unwritten, if not a written, mandate to be slow to interfere with the states in the development of their local policies, and I would be very slow to set aside a state limitation—a limitation statute. I generalize there. I haven't referred to this statute. I would be very slow to set aside a

limitation statute passed by a state. It would be so simple a matter if Congress felt that the execution of an important Federal measure were being hampered, it would be so simple a matter for them to pass something like this: That wherever a lesser limitation is provided by any state law of limitation the plaintiff under this Act shall be as provided here, and if a lot of other ideas get rambunctious this coming January, February and March, and pass a six months' statute, or shorter, that was thought to be trespassing on Federal people, Congress [66] overnight could wipe all of those out. It is a pretty serious matter. I am in accord with the modern trend of the courts, practicing severe self-restraint, very severe self-restraint in holding legislation unconstitutional, state as well as Federal, and I think it would be a serious matter to set aside—I don't say I might not do so; it would be a serious matter for me to set aside this six months' statute.

Mr. Etling: The Court is put in the position, as I see it, of either holding the state statute unconstitutional or else nullifying a Federal statute—nullifying a part of a Federal statute that functions, ——

The Court: Well, no——

Mr. Etling: ——because it is our contention all the way through here that this statute is so short that it strikes at the right rather than the remedy.

The Court: In that statement I might argue with you, too, Mr. Etling. You and I get along too well. You let me have my way part of the

time. A lot of the others don't. I think that is why we get along so well. But in that remark you haven't given any weight to Congressional power to deal with this subject itself.

Mr. Etling: That is true.

The Court: If it sees fit at any time. There are one or two questions before we close I want to bring up. This six months' statute, in effect, so far as publication is concerned, [67] is just a three-month statute, so far as publication is concerned? These laws were published in June.

Mr. Biggs: I guess that is about it. You are speaking about when the Session Laws came out?

The Court: That is right.

Mr. Biggs: That would be just about three months, yes.

The Court: Now the second thing is the one I just touched on a minute ago. I never can remember from time to time—in fact, I don't want to trust to my memory—as to whether there is a Federal statute about how we should approach a claim of unconstitutionality of a state statute. Is that one of those inhibited fields, or not?

Mr. Morris: I think it is a view of the Court rather than statutory, your Honor.

The Court: Well, we have several statutes, you know, that have been passed——

Mr. Morris: We will check it.

The Court: ——that have been passed about that, and I want to be dead sure that I could not sit here, and sit alone, about the validity of an order of the Oregon Public Service Commission.

That I know. Now that is that statute, or some related statute, that covers state legislation. I want to be sure about that.

Mr. Morris: We will check up on that.

The Court: Anything more? There is no hurry. All right. [68] I won't do anything right away. It will give you time to send me up anything you want to, by letter or otherwise.

Mr. Davies: All right. Thank you very much.

The Court: So we will adjourn until half past nine in the morning.

(Thereupon, at 12:34 o'clock P. M., Court was adjourned.) [69]

Friday, December 8, 1944, at 10:42 o'clock A.M., the following further argument was had herein:

The Court: All right.

Mr. Biggs: As I understand, the Court requested some authority relating to the jurisdiction of a single Judge to pass on the constitutionality of a state statute having reference particularly to this case, where no injunction is sought and the question arises only in connection with the defendant's plea of the statute as a bar to the institution of the action.

The section which the Court probably has in mind is Title 28, Section 380, U.S.C.A., which provides that no interlocutory injunction may be issued by a single Judge restraining the enforcement of a state statute on the grounds that it is unconstitu-

tional. That is the gist of the section, and there are some other sections of the Code requiring the finding of a three-Judge court in addition to that but which I think are not applicable here. Those relate to the restraining of an order of the Interstate Commerce Commission, or restraining the enforcement of acts of Congress on the ground that they are unconstitutional, or any actions where the Attorney General files certificates of importance, that is certificates alleging that matters of large public importance are involved in suits between private litigants and, in effect, the Government, an intervening party. [70]

The only one bearing, I think, closely on this section, your Honor, is Section 380, where the constitutionality of the state statute is asserted as to grounds for the application for an injunction.

The United States, or Ex Parte Bransford, 310 U. S. 354, 362, and 84 Law Ed. 1249, this matter was discussed by the Supreme Court of the United States, Justice Reed writing the opinion. In that action, or in that matter a petition was filed for a mandamus to compel a single Judge to convene a 3-Judge Court for the purpose of passing on the validity of certain tax assessments, and so on, in a state. The petition was denied on the ground that there was no application for interlocutory injunction. The Court said this:

"There is no indication that Congress sought by Section 266 to have every attack on the constitutionality of a state statute determined by a 3-Judge Court. It sought such a bench only to avoid preci-

pitate determinations on constitutionality on motions for interlocutory injunctions. As the foregoing ground adequately disposes of the petition for mandamus, we do not discuss other reasons for refusal urged by the bank."

Then in the case of Oklahoma Gas & Electric Company v. Oklahoma Packing Company, reported in 292 U. S. 386, 78 Law Ed. 1312, the Court said this:

"The procedure prescribed by Section 266 may be [71] invoked only if the suit is one to restrain the action of state officers", citing a number of cases. "That this condition is vital is sufficiently indicated by reference to the part played by Ex Parte Young, 209 U.S. 123, in inducing enactment of the section. Hence the cause of action alleged against Wilson & Company, although within the jurisdiction of the District Court, is subject to this extraordinary procedure, and appealable directly to this Court, if at all only because it is incidental to the relief prayed against the state officers. Whether it is so incidentally we need not inquire, for we conclude that the case against the state officers was not one within the appellate jurisdiction conferred upon this Court by Section 266 so as to bring either that case or its incidents before us for decision."

There is an annotation on this question, if the Court please, in 83 Law Ed. 1193. I just ran across that annotation before your Honor took the bench and I haven't——

The Court: Nine hundred and what?

Mr. Biggs: It is 1193, rather an exhaustive annotation. I haven't had a chance to go through it myself. Whether the Court wants to take time for me to read a part of it—it is rather long:

"The scope of the present annotation is, as the title suggests, confined to a consideration of the circumstances rendering necessary or proper a 3-Judge Federal District [72] Court. It is not concerned with procedural requirements as to notice of hearings", and so on.

"Provisions for hearings before three Judges in the Federal District Courts are found in three separate statutes, to-wit, the Act of June 18, 1910 (Judicial Code, Section 266, 28 U.S.C.A. 380);" that is the one that we are referring to; "the Act of August 24th, 1937 (28 U.S.C.A. 380a);" that is a similar provision relating to the restraining of enforcement, the enforcement of a Federal Act instead of a state statute; "and the Act of October 22, 1913 (28 U.S.C.A., Section 47)."

Those are suits restraining the enforcement of orders of the Interstate Commerce Commisison. Those three are referred to here in this annotation.

The Court: See what the summary says.

Mr. Biggs: Yes. I was just looking for it. I will read it generally:

"The Act of June 18, 1910 (Judicial Code, Section 266, 28 U.S.C.A., Section 380) as first enacted provided that, 'no interlocutory injunction suspending or restraining the enforcement, operation or execution of any statute of a state by restraining the action of any officer of such state in the en-

forcement or execution of such statute shall be issued or granted by any Justice of the Supreme Court, or by any District Court of the United States, or by any Judge thereof, of by any Circuit Judge acting as District Judge, upon the ground of the [73] unconstitutionality of such statute, unless the application for the same shall be presented to a Justice of the Supreme Court of the United States, or to a Circuit or District Judge, and shall be heard and determined by three judges, of whom at least one shall be a Justice of the Supreme Court or a Circuit Judge, and the other two may be either Circuit or District Judges, and unless a majority of said three Judges shall concur in granting such application."

That is the statute.

"In 1913 the statute was amended by adding the words 'or in the enforcement or execution of an order made by an administrative board or commission acting under and pursuant to the statutes of such states', and in 1925 the statute was further amended by extending the requirement for three Judges 'to the final hearing in such suits in the District Court'. Provision is also made in the statute for the granting of a temporary restraining order, pending the hearing of the application for the interlocutory injunction, by a single Judge, in the event an apparent irreparable damage from delay.

"The statute, which is purely procedural, was designed to remedy defects in the existing law which permitted single Judges to suspend the oper-

ation of state statutes, often without the exercise of sufficient caution and circumspection. The scope and purpose are concisely set forth in Connecticut Gas Company v. Imes (1926; District Court) 11 Fed. (2d) 191, [74] wherein it was said: 'The mischief at which Section 266 is directed was well understood at the time of its passage. It was the tying up of the operation of an act of a State Legislature, or of an order of the State Commission' ''—

The Court: What is the Summary, to begin with?

Mr. Biggs: I am reading the Summary now, your Honor. It is just discussing generally what this is, unless maybe we have got a conclusion over here (Counsel turning pages).

The Court: Was the statute passed in 1910?

Mr. Biggs: Yes, your Honor, 1910 and subsequently amended. It is about three or four pages discussing the cases and I think it refers to fees. The case that I cited, your Honor, is the one directly in point, holding that it is not necessary unless——

The Court: Let's have Mr. Mundorff look it over while we are talking about other things.

Mr. Biggs: Yes.

The Court: If he thinks there is something in there that ought to be called to our attention he can.

Mr. Biggs: Yes.

(Mr. Biggs here conversed with Mr. Mundorff in an undertone.)

The Court: Of course it is within the recollection of all of us that in this court the constitution-

ality of the Oregon School Law was passed on I think by a single Judge, whether [75] Judge Wolverton or Judge Bean I don't remember, and how the question arose I think you remember. That was ten or fifteen years after the enactment of the statute, because it was in the '20's.

Mr. Biggs: In Ohlinger's Federal Practice, your Honor, this is said as to what conditions are necessary to being a 3-Judge Court, at page 946:

"The Supreme Court has said that the statute is designed for a special class of cases which is sharply defined: Oklahoma Gas & Electric Company", citing a number of these cases: "also that 'the requirement of the statute has regard to substance and not form' and should be construed and applied to effect the purpose of its enactment.

"Four circumstances must co-exist to require the calling of additional Judges: (1) An application for an interlocutory injunction must be prayed and pressed; (2) The interlocutory injunction sought must be directed against what is, or purports to be, the enforcement of a state statute, or of an order of a state administrative board; (3) The interlocutory injunction sought must be one which would restrain the action of a state officer: (4) The ground, or one of the grounds, on which the application for the interlocutory injunction is made and pressed, must be that the statute, order or acts complained of, violate the Constitution of the United States." [76]

This section applies, whether the interlocutory injunction is prayed and pressed by motion in an in-

dependent suit or in a dependent bill in a receivership.

Someplace else I noticed the syllabus to the effect where the constitutionality is alleged, that it violates the Constitution of the state and not of the Federal Constitution, that that would not be sufficient grounds for the convening of a 3-Judge Court. It must be against the constitutionality of the United States, and that is as laid down here by Ohlinger.

The Court: Now let's go to some other thing.

Mr. Biggs: Yes, your Honor.

The Court: You want to be heard, Mr. Etling?

Mr. Etling: I haven't very much to add, your Honor, except that as far as this Fair Labor Standards Act is concerned, this Court has jurisdiction, and I cite as authority the case of Womack v. Consolidated Timber Company, which was decided by Judge Fee.

The Court: By the way, why did you think it necessary, or did you think it necessary, to establish the diversity of citizenship?

Mr. Etling: That was just on the question of reasonableness here. I have an additional authority on that, too. Womack v. Consolidated, 43 Fed. Supp. 625, and also 132 Fed. (2d) 101; 121 Fed. (2d) 285; and then the case of Berger v. Glouser, [77] 36 Fed. Supp. 168. Regardless of diversity of citizenship or amount in controversy District Court had jurisdiction in this action.

I have a case that I want to go into on this other point of the constitutionality under the Oregon

Constitution, which is a case of a kind very similar and practically on all fours with the case here.

The Court: All right. I will hear you.

Mr. Etling: Now?

The Court: Yes.

Mr. Etling: At this time I wish to urge that the state statute of limitations, the one in question here, violates Article IV, Section 22 of the Oregon Constitution, in that it violates the provision of the Constitution, which states——

The Court: Senator Irving Rand, who was the author of the bill, is present. I called to ask him the other day about some of the facts about the introduction of the bill and its passage, and I am sure everybody joins me in welcoming him to take part in this discussion, if he would care to.

Mr. Etling: We will be glad to have him.

Mr. Rand: Yes. I would like to listen to the discussion. I don't know what the issues are. I haven't read the briefs, so I won't be prepared to say very much.

The Court: Well, you may have a chair and feel free to take part. You know Senator Rand, Mr. Etling. [78]

(Mr. Etling was here introduced to Senator Rand.)

Mr. Etling: Shall I proceed?

The Court: Yes.

Mr. Etling: We wish to urge it follows that section of the Oregon Constitution that states that no act shall ever be revised or amended by mere reference to its title.

The Court: You want to take part in this? We just asked another man up here.

Mr. James Landye: I beg pardon?

The Court: I say, did you come here with a chip on your shoulder? We just asked another man in here.

Mr. Landye: No. I just came to listen, your Honor.

The Court: All right.

Mr. Etling: But the Act revised or section amended shall be set forth at full length. And in this regard I also wish to urge that the act violates Article I, Section 21 of the Oregon Constitution, in that it impairs the obligation of contracts in the Oregon Constitution, and also it violates the Oregon constitutional provision on due process.

Now leading up to this case, I wish to cite the case of 39 Fed. 376, the Barrowdale case, and that was a case before Judge Deady of this court, decided in 1889, and I would like to mention to the Court, the Court already knows that Judge Deady was a Justice of the Territorial and Supreme Court of [79] Oregon for about ten years. He also presided at the Constitutional Convention in Oregon as Chairman, and he was District Judge until his death, a period of about, I believe, twenty or thirty years; and also Judge Deady at the time compiled the Oregon Laws.

The Court: And you might add he was redheaded and his picture appears above me.

Mr. Etling: In this Barrowdale case, speaking

of the intention and purpose of this Constitutional provision, he states:

"The purpose of the Constitution in requiring the 'subject' of an act to be expressed in the title thereof is apparent, and has often been stated by Courts and Judges with great unanimity. Briefly, it is to give notice to members of the Legislature and others concerned of the general scope and purpose of the proposed legislation, and to prevent the enactment of laws containing clauses and provisions not indicated by the title, as therein expressed. Therefore, the Constitution is not complied with in this respect by the expression of a or any subject in the title, but the subject of the Act must be truly expressed."

Then getting later down to the Oregon Decisions there is the State Ex Rel Thomas v. Hoss, 143 Ore. 41.

Proceedings by Deputy Labor Commissioner to require Secretary of State to audit plaintiff's claim and issue a warrant. [80]

In this case the Legislature enacted a law providing for a temporary reduction of salaries of state officials and the Act contained an emergency clause, whereby it became effective, on the signature of the Governor, as the case at bar, and also there was a section that repealed all acts and parts of acts in conflict therewith.

Among the contentions of the plaintiff was that the Act violated Article IV, Section 22 of the Oregon Constitution, and on the day that the law took effect there was already fifteen days' salary earned

by the party involved here. It was held that the right to this salary was vested and cannot be taken away by the legislation thereafter enacted.

The Court: What is the Article referred to?

Mr. Etling: That is the section I just read, that every Act must be set forth—"No Act shall ever be revised or amended by mere reference to its title, but the Act revised or section amended shall be set forth and published at full length."

The Court: Yes.

Mr. Etling: And then going on, the Oregon Supreme Court expressed the purpose of this:

"This section was adopted for good reasons. It has been a custom with our legislators to amend existing laws by mere reference to their titles, and under that cover to change words and phrases anywhere in its sections, to insert [81] and strike out sentences; to repeal parts of sections at one session, and at the next to repeal and amend until it had become a real task to discover what was the existing statute on many subjects, and without the utmost watchfulness the legislators could not know the extent or effect of proposed amendments."

In the case of Donlan v. Barnard, 5 Ore. 390, the Court again expounded the purpose of this Constitutional Provision, and it stated:

"Hence, the Legislature is required by our Constitution to set out and incorporate in the amendatory act not only the changes made in the Act amended, but the portions thereof not effected by the amendment in such manner that the syntax and meaning of the law as amended will be complete

within itself. This is required in order that those who are interested in knowing what the law is may find it out without prospecting through a labyrinth of words, phrases and sentences, as found in a long list of acts amendatory of the others, to ascertain what the law is in force at the time."

The Court: Of course I would expect you to have strong opinions about this case. I had a warehouseman's case that you had where $3.75 was involved, or some such sum, and I took two days here in trying to correlate the Oregon statutes on warehousemen.

Mr. Etling: Yes. I remember that very vividly, your Honor. [82]

The Court: I would have been glad to put up the $3.75 many times during the two days but I didn't see any way to do it really. I pretty near lost Laird McKenna's friendship over it. He was on the other side. He thought it was a great waste of time. I didn't hold with you, either, did I?

Mt. Etling: Yes, you did, but I don't believe your Honor decided it under the Oregon statutes. That was on a mechanic's lien.

Now finally, in 25 R.C.L., Sections 117 and 119, it is stated:

"But if an Act is not complete in itself, and is clearly amendatory of a former statute, it falls within the constitutional inhibition, whether or not it purports on its face to be amendatory or an independent act."

And it states: "Even though an Act professes to be an independent Act and does not purport to

amend any prior Act, still if, in fact, it makes changes in an existing Act by adding new provisions and mingling the new with the old on the same subject so as to make the old and the new a connected piece of legislation covering the same subject, the latter Act must be considered an amendment of the former and as within the constitutional prohibition."

Now at this time I wish to cite a case of Sayles v. Oregon Central Railway Company, decided by this Court in 1879, again by Judge Deady, and it is a short case. It might be [83] easier for the Court to refer to the case.

The Court: Get that, will you.

Mr. Etling: It is 6 Sawyer 31.

The Court: Go right ahead while I am looking at it.

Mr. Etling: Now that was an action for damages for patent infringement and the defendant demurred to the complaint and alleged the action was barred by the lapse of time. Section 55 of the Patent Act of 1870 provided that actions arising under the patent laws "shall be brought during the term for which letters patent shall be granted or extended, or within six years after the expiration thereof."

In the Revised Statutes said Section 55 is reenacted as Section 4921, less the limitation clause above quoted, which was repealed by operation of Section 5596 of the Revised Statutes. Section 721 of the Revised Statutes reenacts Section 34 of the Act of September 24th, 1879, making the laws of

the several states "rules of decisions in trials at common law", except where the laws of the United States otherwise provide. Now under this Act, this Rules and Decisions Act, it has been uniformly held that when Congress has not otherwise specially provided, the state statute applies to actions in Federal Courts. It follows unless there is a savings clause in the Federal Statutes as revised, that only a state statute would apply.

Now plaintiff, or, rather, the defendant, assuming [84] that there was no saving clause, contends that this action was barred by Subdivision 1 of Section 8 of the Oregon Civil Code, which limits commencement of actions enumerated to two years from the time cause of action accrued.

Originally the clause in Subdivision 1 of Section 8—that is the Oregon Code—concerning actions for any other "injuries to the person or rights of another", under which it is sought to bar this action, was contained in Subdivision 5 of Section 6 of the Territorial or of the general laws of Oregon, and that gives six years in which to sue upon causes of action therein enumerated. But by the subsequent Act of October 22nd, 1870, Oregon Session Laws of that date, it was attempted to amend both Sections 6 and 8 of the Code as it had previously existed, by simply repealing Section 5 of the Code and repealing and re-enacting Section 8, so as to include in Subdivision 1 thereof the cases before then provided for in Subdivision 5 and thereby reduce the time within which actions might be brought from six to two years.

The Court said:

"It can hardly be doubted that this attempt to amend said Section 6 by simply repealing a certain portion of it, is in direct violation of Section 22 of Article IV of the Constitution of the State, which provides that 'no Act shall ever be revised or amended by mere reference to its title, but the Act revised or section amended shall be set forth and [85] published at full length.' "

The Court goes on to say, now although Section 8 may have been properly amended, yet, if Section 6 was not, then Subdivision 5 thereof is still in force; wherefore, the result is that there are two periods of limitation in the statute for actions of this kind—one for six years, the other for two. In such a case the plaintiff may avail himself of the longer period, and the shorter is practically a nullity.

I believe that case is practically on all fours with the case before us.

The Court: You might tie it up a little further now. Why do you think it is?

Mr. Etling: Well, I think that because the applicable state statute, prior to the passage of this six-months and 90-day statute, was Section 1-204 Oregon Code, 1940, which stated that actions must be commenced within six years; first, upon actions for contract or liability, express or implied, excepting those mentioned in Section 1-203, and, two, upon an action for liability created by statute other than a penalty or a forfiture.

We contend in this case this is a liability created

by statute and we have a number of decisions to support that, if the Court is in doubt of that.

Now the six-months statute—we have a copy of the [86] Session Laws. We have failed to set forth the section which it really amended there. It makes no reference to it whatsoever, and I don't know whether your Honor has——

The Court: I have got it here.

Mr. Etling: Also I have the Senate and House Journals, which show all the proceedings that were taken by the Legislature on this question, and there was one case where any real objection seems to have been raised. That was raised by Senator Mahoney, joined in by Senator Strayer, and they objected to this 90-day clause. I don't know whether your Honor has seen——

The Court: Of what value is that?

Mr. Etling: That all the more confirms this objection that if the Act had been set forth fully as presented to the legislators the possibility of the results might have been different.

The Court: Now just how is this like the Deady case?

Mr. Etling: Now in this case this Act, the six-months Act, amended and changed the previous statute of limitations which I have just read, six years. In the Deady case the statute of limitations had previously been six years and the amendment reduced it to two years. And I also have the Session Laws in that case, as well as the general laws. Examination of them will show that this is even a more flagrant violation than there was in that case, and in that case——

The Court: Where did you find the Deady annotation? [87]

Mr. Etling: I found that in the Oregon Code.

The Court: Under a section of the State Constitution?

Mr. Etling: Yes. I have it here, if your Honor wishes to refer to it.

The Court: No. I just wondered if it had been picked up by codifiers and carried along.

Mr. Etling: Yes, it had. Now I have a few more things to say but I don't want to interrupt this particular phase of the proceedings.

The Court: You had better complete your argument on all points.

Mr. Etling: All right. I have these authorities, if the Court wishes to examine them. Now I wish to cite to the Court 66 A.L.R., page 1483, also where it is stated that, "It is the uniform rule that where there is a valid act and an attempted but unconstitutional amendment to it, the original Act is not affected, but remains in full force and effect, even though there are express words of repeal, unless it is clear that the original intended such repeal."

And I also wish to comment on the case of Koshkonong v. Burton, cited by counsel for the defendant at our last meeting. I have examined this case and I have my doubts whether, on the authority of this case, the Court would find anything to assist in holding the six months part of the statute applicable, should the Court find the 90-day portion [88] is unconstitutional.

The Court: I will be glad to hear you on that.

Mr. Etling: In this particular case there had previously been a 20-year statute of limitations and it was reduced to six years by the Legislature but it had a one-year savings clause. Where the period of time was about ready to lapse it was thought that they should have one year to present it, and the plaintiff in this case attacked the Constitution as impairing the obligations of contracts, and attacked particularly that one-year statute, and the Court held in that case that if it declared the one-year unconstitutional—I believe it did—that the six years would not necessarily become controlling at all.

The Court: He didn't rule on that. That is about the only thing I can understand in that opinion. He says explicitly he doesn't want to rule on that question, as to whether the one-year statute was too short, and, therefore, unconstitutional.

Mr. Etling: Yes, but the Court indicated a reasonable time would be allowed. But I did find some consolation in the case, particularly on this question of nonresidence, and I wish to cite it to support this other case that I have in my brief. It is Adams & Treese Company v. Kenoyer.

In this Koshkonong case, page 675, the Court recognized that what would be reasonable time might be different in the [18] case of nonresidence of a party, and made this comment:

"Whether the first proviso in the Act of 1872, as to some causes of action, especially in its application to citizens of other States holding negotiable municipal securities, is or not in violation of that

condition, is a question of too much practical importance and delicacy to justify us in considering it, unless its determination be essential to the disposition of the case in hand."

The Court refused to rule on it because it was not before the Court.

I believe that is all. If there is any doubt of the Court as to whether or not this is a penalty or liquidated damages, I would like to cite some additional authorities.

The Court: Well, how is that?

Mr. Etling: If there is any doubt in the Court's mind as to whether or not this 16(b) of the Fair Labor Standards Act is a penalty statute, or, rather, a liability created by statute, we have some additional authorities.

The Court: There has been no issue made on it by the other side, has there?

Mr. Etling: We have cited some authorities in our original brief.

The Court: Has the other side made any issue of it?

Mr. Biggs: We haven't made any particular issue on that.

The Court: No. [90]

Mr. Etling: Other than referring the Court to some of these original Acts, that is all I have.

The Court: I have a little personal matter which will take me fifteen minutes. I will be back after that time. That will give you a chance also to

check over material about this Deady case. I would like to have you consider it now.

(Short recess.)

Mr. Etling: Your Honor, I realize my time is up but I do want to mention that I also have the Iowa Session Laws containing a copy of that statute from Iowa that was held unconstitutional.

The Court: What does it say? You stated here the other day it was directly and solely against the Federal Statutes?

Mr. Etling: Yes.

The Court: And not against the Fair Labor Standards Act alone, I suppose?

Mr. Morris: That is correct.

Mr. Etling: It says, "All rights under Federal Statutes. In all cases wherein a claim or cause of action has arisen or may arise pursuant to the provisions of any Federal statute, wherein no period of limitation is prescribed, the holder of such claim or cause of action may commence action thereon within but not after a period of six months before March 1st, 1943, if such claim or cause of action arose prior to March 1st, 1943, or within but not later than six months after the accrual [91] of such claim or cause of action if such claim or cause of action arose after March 1st, 1943."

Mr. Morris: May it please the Court, I will endeavor to confine my remarks to the question of conflict of this statute with Amendment 22, Article IV, of the Oregon Constitution.

I think it would be helpful if we should first con-

sider the evil at which the Constitutional provision was aimed, as obviously the provision will be construed in the light of the evil—the Territorial Laws of 1959, several of the Territorial Laws, which serve as examples of the type of legislation which the amendment was designed to prohibit.

In 1859, at page 61, this is one of the Territorial Laws and will serve as an illustration:

"An Act to amend an act entitled, 'An Act relating to roads and areas.'

"Section 1 . . . that the act relating to roads and areas be so amended that the word 'April' wherever it occurs in Title 4th of said Act, be changed to 'December', and that the word 'May' in Section 27, be changed to 'March'."

Again, another act in the same report, "That the act entitled 'An Act relating to "stallions", passed January 10, 1954,' be, and is hereby amended, by striking out the words 'two years', in the first section of said act, and by inserting the words 'eighteen months' in the place of the words so stricken out."

Well, there are numerous other examples, but that [92] will serve to show what the policy of the Territorial Legislature was.

Considering the Constitutional provision, I think the conclusion may safety be drawn, after a study of the Oregon Supreme Court cases, that a statute which is complete within itself, a statute which does not patently attempt to amend the existing legislation, does not fall within the ban of the Constitutional provision.

A statute which in form is independent legislation is not subject to the criticism that it does not comply with the Constitution.

The fact that such a statute amends or repeals by implication existing statutes does not violate the Constitutional provision.

I think the leading case in Oregon, construing the Constitutional provision, is Warren v. Crosby, reported in 24 Ore. 558. The question there arose on the power of the City of Astoria to levy and collect taxes. There had been a special Act creating Astoria, giving the council the power to assess, levy and collect taxes. A general law was then enacted, or thereafter enacted by the state legislature, which covered the assessment and levy of taxes, and, in effect, repealed the provision in the charter of the City of Astoria, under which the council attempted to act. This suit was brought to enjoin action by the councilmen under the previous law. There is a [93] lengthy and quite an enlightened discussion of the effect of this Constitutional provision. I will not attempt to read all of it. Referring to the Constitutional provision the Court said:

"The language of that provision is both prohibitory and mandatory. By its terms it inhibits the revision or amendment of an Act by mere reference to its title, and requires that the Act revised, or section amended, shall be inserted at length. It does not purport to limit or restrict the power of the Legislature in the enactment of laws: it relates only to the mode or form in which the legislative power shall be exercised. The evil it sought

to remedy was the mode in which the legislative power was sometimes exercised in the enactment of advisory or mandatory laws. This evil, as is well known, was the practice of amending or revising laws by additions or other alterations, which, without the presence of the original law, were usually unintelligible. Acts were passed amending statutes by substituting one phrase for another, or by inserting a sentence, or by repealing a sentence, or a part of a sentence, in some portion or section thereof, which, as they stood, often conveyed no meaning, and, without examination and comparison with the original statute, failed to give notice of the changes effected. By such means, an opportunity was afforded for incautious and fraudulent legislation, and endless confusion was introduced into the law. Legislators [94] were often deceived and the public imposed upon by such modes of legislation. To prevent these consequences, and to secure a fair and intelligent exercise of the law-making power, was the object of the Constitutional provision in question."

"While, therefore, the effect of the Act was to alter or change to this extent an existing power, it was produced by such Act repealing pro tanio, by implication, the section of the charter which conferred it. The Act itself was complete—its meaning and scope plain and apparent; nor was there anything on its face to evince an amendatory character. It was an independent Act of legislation designed to regulate the sale of liquor in the state."

This is referring to another case.

"When an Act of this character so operates as to modify or change prior acts of legislation, it does not fall with the mischief designed to be remedied by the Constitution, although the effect is to alter or amend by implication some prior legislation upon the same subject."

Now the statute here involved is not designed as amendatory legislation. It is complete upon its face. It is independent legislation and meets the tests established by the Oregon Supreme Court.

I think the excerpts I read will serve to distinguish the decision by Judge Deady. The legislation involved in that [95] case was this:

"That Subdivision 5 of Section 6 of Chapter I of the Code of Civil Procedure be hereby repealed."

Judge Deady suggested that that did not comply with the Constitutional provision, and that was one of the faults, as this Crosby case points out, that the Constitution was designed to cure. All that the Deady case holds is that the Legislature may not expressly repeal a portion of a statute by reference to a subdivision. We do not have that type of situation here, your Honor. I can go on and labor the point and refer you to all the Oregon cases. I think you will find Warren v. Crosby, and State v. Hoss, 143 Ore. 41, as enlightening as any, and I think the principles that they establish can lead only to the conclusion that this statute does not violate the Constitution.

I have nothing further to add, unless there is some question. Do you care for the citations of all the Oregon cases, your Honor?

The Court: No.

Mr. Biggs: I don't know if there is anything more, if the Court please, on any of these points that can be added that has not already been said. Mr. Mundorff called to my attention during the recess that these annotations would seem to bear out the proposition that this Court clearly in this case has the authority to pass on the constitutionality of the Act. [96] It calls attention to this statement in the annotation establishing that a single Judge may even pass on an application for a permanent injunction, relying upon or asserting the unconstitutionality of a state Act if no interlocutory injunction is sought in the beginning.

The Court: Do you want to add anything to the claim you made the other day for the Koshkonong case.

Mr. Biggs: Well, I have read that case, your Honor, and have done some additional research in connection with it. I don't see how the case can stand for anything other than the proposition we asserted for it the other day. In the Koshkonong case the Supreme Court said, We do not find it necesssary actually to pass upon the reasonableness of the one-year saving clause because the fact is the action was not brought within the six years provided by the new statute, in admitting that the six years in any event would be a reasonable time, and since it was not brought within that time but was brought within eight years after the case had accrued—after the statute had been passed—that it was brought and gave as its reasons, your Honor,

the principle that if the savings clause did fall, so that an action that had not been barred by the previous statute of limitations, and was still an enforceable cause of action when the new statute was passed —if the new statute cut if off immediately, [97] then of course it may be said to be unconstitutional, because it deprived him of property without due process, but if it provided a savings clause, which was insufficient in length of time, the savings clause would be inoperative and a reasonable time would be given after the enforcement of that cause of action.

The Court: Why?

Mr. Biggs: Because if the other is unconstitutional, then the savings clause is unconstitutional. That does not mean the entire Act falls. Only that part of it that is declared to be unconstitutional is eliminated; then a reasonable time must remain. What is a reasonable time evidently is left to the Court but the Court in that case considered six years——

The Court: What time is a reasonable time?

Mr. Biggs: Well, a reasonable time must remain to future determination. I think it is conceded by most Courts if the new statute of limitations coming to be applied immediately, were held to be effective so as to bar at that time existing causes of action which were still alive under the old statute, then it would be held unconstitutional as being in conflict with several sections of the Constitution.

The Court: Wasn't that rewriting the statute?

[98]

Mr. Biggs: They haven't held it as rewriting the statute. They have held, in the Koshkonong case that by seeking a construction of the statute that will save its constitutionality, the Court is acting within its prerogative; that is, that it should seek always to find a construction which will preserve the constitutionality of the Act.

The Court: Justice Harlan never used that phrase in that opinion.

Mr. Biggs: No. Didn't use which phrase in that opinion—in the Koshkonong case?

The Court: Yes.

Mr. Biggs: No, I think that he did not, although I think that is probably implied in the opinion, and I think that principle has been asserted by other Courts, and I think the Koshkonong case has been cited to support it.

The Court: Was this his argument, do you think, which he didn't put on paper, but was this his reasoning: That if the savings clause fell, that would leave the 20-year statute as to accrued causes?

Mr. Biggs: Yes.

The Court: The old statute in that case was twenty years.

Mr. Biggs: That is correct.

The Court: And would give subsequently accruing causes six years only?

Mr. Biggs: That is correct. [99]

The Court: And would make the statute so lopsided that it would defeat the whole statute.

Mr. Biggs: I think that is fairly inferably from

thaf, your Honor, because clearly the Legislature must be believed to have not wanted the 20-year statute. That was too long a time. They no longer wanted that to be operative. They attempted to amend it and thereby declare the public policy of the state to shorten the time and not permit the accumulation of twenty years. Now there would be a distinction between causes of action accruing before that time and causes of action accruing after that time.

The Court: So, if that is what the learned Justice had in mind, although he certainly didn't get it on paper—if that is what the learned Justice had in mind applying to this case, if the savings clause of 90 days were to fall here, that would leave the accrued causes under the six-years statute.

Mr. Biggs: We don't agree with that. That is contended for by counsel here but we don't believe that under the Koshkonong case that would be effective.

The Court: Well, I guess there is something else then. I thought we had just said in the Koshkonong case—how is that spelled?

Mr. Biggs: Koshkonong—K-o-s-h-k-o-n-o-n-g.

The Court: All right. I thought we just said in the Koshkonong case that what Justice Harlan must have had in [100] mind was that if the savings clause of one year fell that would leave the old 20-year statute applicable to accrued causes as against six years only for subsequently accruing causes.

Mr. Biggs: Oh, I see. Well, I think that is one

alternative that we thought might occur, but I think he really held that to avoid that alternative being held operative and no six-year statute. That is what I thought the new case stood for. We have read it so many times and it is a difficult thing to understand from the language.

The Court: I know. The more you read it the worse off you are.

Mr. Biggs: Yes. It says this: "Whether the first proviso in the Act of 1872, as to some causes of actions, especially in its application to citizens of other States holding negotiable municipal securities, is or is not"—that is the savings clause—"is or is not in violation of that condition, is a question of too much importance and delicacy to justify us in considering it."

The Court: Of course he didn't have it before him in that case? He didn't have the one year, did he?

Mr. Biggs: Yes, he did, your Honor, because the coupons at the time the 1872 Act was passed, the coupons were still alive in the 20-year statute. Then the 1872 statute was passed giving them six years. He didn't actually bring his [101] action until eight years after the 1872 action had passed, and that is the reason that the Court said it is not necessary to consider this one-year statute because, in any event, he didn't bring it within the remaining six years, and also said, "We think it is not necessary to consider it. If the proviso, in its application to some cases, is obnoxious to the objection that it does not allow sufficient time within which to sue before

the bar takes effect, and is, therefore, unconstitutional, as impairing the obligation of the contract between the town and its existing creditors, it does not follow that the entire Act would fall and become inoperative. The result, in such case, would be, that the plaintiffs and other holders of the coupons would have not simply one year, but—under the construction we have given to the statute in force prior to the Act of 1872—to a reasonable time after the passage within which to sue. And if a proper construction of that Act," the 1872 Act, "would give the full period of six years, after its passage, within which to sue upon coupons maturing before its passage, the judgment below cannot be sustained."

The Court: Mr. Biggs, the Legislature passes a law and says that a man who has an accrued claim prior to the effective date of the Act, has 90 days within which to sue on the claim, and that claims subsequently accruing must be brought within six months. One of the former class going to a lawyer on the ninety-first day is told that his claim is barred, he can't [102] bring his case, and then he gets another idea and a year later sues. He is met with the limitation statute. He is met with the argument that he had six months and he didn't sue within the six months, and he says, "But the statute says I have ninety days and I went to a lawyer on the ninety-first day and he said I was one day too late. If I had known then I had six months, or if the lawyer had known I had six months, he would not have told me that; or if I had known I had six

months I would have gone and got another lawyer." He said, "I was just going by what the statute said, and this is an idea all made up after the fact to uphold the statute but it works out very badly for me. It looks to me like somebody is rewriting the statute. It looks to me like I was entitled to be guided by what the statute says as to my case."

Mr. Biggs: In the case that your Honor has put, you illustrate the difference in the application of this statute to various individuals. Now I don't think anyone contends that the ninety days can be prolonged to six months by words of the statute, but I think that in the Koshkonong case and the Sohn case, the one I am going to refer to a little bit later —I think the Court, in the Koshkonong case, simply said: "We don't have to determine whether the one-year statute is reasonable or not reasonable in this particular case, because even if we hold that it is unreasonable, and, therefore, falls, he still has not brought his action within the time [103] that would be applicable if the one-year statute were not applicable or were not valid."

I think it is simply a rule that the Court in that case adopts to avoid passing on the constitutionality of the one-year period.

He says, "It is not necessary to pass on that, because this man didn't attempt to exercise his rights within that one year. If he had, then it would be necessary for us to determine whether or not it was or was not barred, but since he didn't, and also then didn't exercise his rights within the

remaining six years, that certainly would have been a reasonable time, and, therefore, the applicable period. He is not here in this particular case. The circumstances are not such that we are required to pass on it."

I think that is the explanation of the Burton case.

As to the general principle of the applicable statutes of limitations where no savings clause at all is provided, the Supreme Court in the Sohn v. Waterson case has considered the proposition. Of course if the Court is not familiar with that case I would like to call your attention to the facts of the case. That is reported in 17 Wallace Reports 596.

In that case the plaintiff, Sohn, a resident of Ohio, had recovered a judgment against Waterson, who was also a resident of Ohio. That is in 17 Wallace 596, back in 1854. [104] Waterson then removed to Kansas and after he had been in Kansas about three years Kansas passed a statute of limitations applying to judgments, bonds, notes, and so on, and requiring that the action be commenced thereon within two years from the date of accrual of the cause of action. Here Waterson had been sued in Ohio, judgment had been obtained against him, and then he had removed to Kansas and after he had been in Kansas a short time, or about three years, a Kansas statute was passed reducing the time to commence an action on judgment to two years. Previous to that time I think there had been no statute of limitations at all on it. Sohn

came into Kansas then and he sued Waterson in Kansas on the judgment and the statute of limitations was pleaded. The Court overruled the demurrer to the statute and entered the judgment for the defendant, sustaining the statute.

Plaintiff, on appeal, contended that since the statute contained no savings clause as an existing cause of action more than two years old, it was unconstitutional and, therefore, there was no statute of limitations applicable at all. That was the contention made by the plaintiff.

The lower Court's judgment was affirmed and it was held by the Supreme Court that in this case, where the statute contained no savings clause, the statute should be so construed as to preserve its constitutionality, if possible; that is, if it were construed to apply retrospectively; and [105] to cut off all judgments, valid judgments, immediately upon the effective date of the passage of the statute, which probably would fall within the ban of the Fourteenth Amendment—would fall because of being in conflict with the Constitution.

The Court said that, since, at the date of the passage of the statute, the right would have been cut off at once, which would render it unconstitutional, construction will be given to it to preserve the constitutionality of the statute. The Courts will declare that it operates prospectively on accrued as well as on future causes of action, and it says this results, citing the Koshkonong case—no; it was earlier than the Koshkonong case. Yes, it was earlier than that. It said there were three

theories that the Courts took to sustain this result. One is that the new action will apply, or the new statute will apply only to causes of action occurring in the future. It said that this is not a desirable theory, because that leaves existing causes of action without any statute of limitations applicable to them at all. Secondly, that the Court might apply the statute to such existing causes of action as have only partially run out the time allotted by the new statute, and holding that there is a reasonable time left, then that they come within the ban of the new statute. Of course, if there is no reasonable time left, the criticism of that rule is the same as the first one, that [106] it leaves the original cause of action without any statute of limitations at all, which is of course contrary to the announced policy of the Legislature in attempting to fix a time; but, it says, the next theory is the calculating of limitation as of the effective date of the statute, allowing the period of the statute from and after that date as the time for the commencement of the action, regardless of how long before the cause of action accrued.

That case has been rather widely cited, and I think it generally is followed. It is true it is distinguishable perhaps from the case at bar, because in the case at bar the Legislature did clearly express its intention as to how the statute should apply to existing causes of action. It said it should apply to cut off existing causes of action unless the action was instituted within ninety days. So that the Legislature's intention in our case is very clear.

There is not any particular rule to pass upon what the Legislature really intended or meant with respect to existing causes of action. It very clearly stated that they should be brought within ninety days after the date of the statute—the effective date of the statute.

Now our question, of course, is, if the Court determines that it must declare the 90-day period invalid as being unreasonably short, and that the circumstances that the Legislature might have had in mind persuading the Legislature [107] to adopt ninety days as to existing causes of action and six months as to causes of action accruing thereafter, that is, if the Court can, and does say, as a judicial matter, the Legislature acted unreasonably in fixing that time, then it does become necessary for the Court to determine what must have been the unexpressed intent of the Legislature in that event as to existing causes of action, whether the Legislature was intending that existing causes of action not brought within the ninety days have the benefit of the full six-year statute of limitations existing prior to that time, or shall have the benefit only of the six-months period applicable to causes of action accruing thereafter, and while the Koshkonong case is not satisfactory in respect of clarity it is difficult to understand just exactly what the Justice did have in mind, still I think it does stand for the proposition that in a case of this kind, judging this particular case, where the action was not brought until after the longest period provided by the new statute, the Court either in this case

may hold that it is not necessary to pass on the validity of the 90-day savings clause because he didn't attempt to avail himself or bring himself in the remaining six months.

The Court: That is assuming the date, six months, was not unreasonable?

Mr. Biggs: Assuming that the date, six months, was not unreasonable; that is true; but it all gets back eventually to [108] the ultimate determination of the question as to whether the Court can say, as a matter of law, upon the showing made in this case, that the ninety days or six months is unreasonable. In that connection it appears that the Court so to hold almost would have to declare that it was per se unreasonable, because there has been no showing here of extenuating circumstances other than the fact that the plaintiff moved to Vancouver, Washington, which the testimony shows is within the same industrial area as Portland; he traded in Portland; that he took Portland newspapers and had really as much opportunity to be advised of the new statute and to learn of it as Oregon residents. That is the only circumstance shown in this case as to the harshness of the statute or the fact that it did not give plaintiff's prospective plans a reasonable time within which to bring their actions.

We have cited cases to your Honor, a number of cases, in which courts have gone both ways on it, but I think the majority of the courts have held with respect to periods that are short, that the time is reasonable, or, at least, that the courts cannot

say, as a matter of law, that the Legislature acted unreasonably in fixing that time.

The Court: Now this man in Lane County, suing before Judge Skipworth, sued for $6,000 approximately overtime and $6,000 as liquidated damages, and the further sum of $1200 attorney's fees, and he wanted $13,200 from Lamm down there [109] in northern Deschutes County—rather, I guess in Lane County, and he filed his complaint in October, 1943, and the statute was pleaded, as you know, and Judge Skipworth upheld it.

Mr. Biggs: As to both I think the 90-day and the six-months. I think that was involved in that case, to, wasn't it, your Honor?

Mr. Davies: That was an accrued claim.

Mr. Biggs: That was an accrued claim, so it would not be——

The Court: Yes, it was an accrued claim and the six months ran out.

Mr. Biggs: About August, I imagine, or September, wasn't it? September, I beileve, your Honor.

The Court: September?

Mr. Biggs: I think so. It would be six months from March.

The Court: About thirty days before he sued?

Mr. Biggs: Yes.

The Court: Now knowing Lamm, as I do, and Judge Skipworth as I do, and Judge Harris, who defended the case, as I do, it would have been very interesting to have seen the position they all would

have taken had this man sued in August for this twelve thousand dollars.

Mr. Biggs: Mr. Davies was down there. I don't know whether that was argued.

The Court: If he had sued thirty days on an accrued claim, which the statute says was killed in June. [110]

Mr. Biggs: That is right.

The Court: If he had sued thirty days before the expiration of the six-months period, which the statute said was for subsequently accruing cases, instead of thirty days after the six-months period, I imagine he would have been met with pretty strong contention that the 90-day section, and that alone, controlled his action.

Mr. Biggs: Of course, the situation is analogous to this, only our man, the plaintiff here, has moved from the community. Mr. Davies was down there. I don't know whether that matter was discussed in the argument or not.

Mr. Davies: I appeared as a friend of the Court, and Mr. Etling was, I believe, that kindly phrase amicus audio at that time. He coined the phrase. I don't recall that the six months was discussed. I think the entire discussion was the ninety days. Do you remember, Carl?

Mr. Etling: Well, I have copious notes that I took on the matter but I don't remember——

The Court: That is really not what I am bringing up. What you are saying now in this case is that Mr. Etling's client, who had an accrued claim which was covered by the letter of the statute with

the 90-day clause, because he did not sue within six months, which, by the letter of the statute, applied only to subsequently accruing claims,—you are saying now that he had the benefit of the six months but he didn't [111] use it?

Mr. Davies: We are saying that the statute—of course, our first contention is that the ninety days is proper. If the Court should take a different view of that we believe, under the authority of this case, he would be barred in any event, because he fails to come within the six months. Yes, that is right.

The Court: All right. That is hardly what the Koshkonong case said. He does not pass on the savings clause in that case.

Mr. Davies: That is right.

The Court: Refused to pass on it and said he does not have to pass on it because the man didn't sue within the six months.

Mr. Davies: That is right.

The Court: So applying that to this case you say I don't have to pass on the 90-day clause because the man didn't sue within the six months.

Mr. Biggs: That is correct.

The Court: So I say it would have been intertesting in the Lane County case had the man sued within the six months but after the ninety days.

Mr. Biggs: That is correct.

Mr. Davies: I just wanted you to know it didn't come up down there.

The Court: Well, it didn't come up because he was thirty [112] days over the line.

Mr. Biggs: Of course, as you read the statute, the intention of the Legislature is made clear in the 90-day proviso, but, if we remember, declared unconstitutional, the statute still is a whole statute and does actually by its terms apply to accrued as well as accruing causes of action, because it uses that word, accrued or accruing. That will be literally the interpretation of the statute. We know what the Legislature had in mind at the time it passed it. But if the Court says whatever the legislative intention may have been the proviso will stand, then the Court is faced with the construction of the remainder of the statute and, with that literally construed, would apply it to existing or accrued causes of action.

I don't know that there is anything more that we can offer, your Honor, on the point.

The Court: What about Simpson v. Winegar? Do you want to say any more about that, in 122 Ore. 297?

Mr. Morris: If your Honor please, that was a case that we found when you referred to an opinion by Judge Rand on the emergency legislation passed during the session and apparently that was not the decision you did have in mind.

The Court: Of course it was. I have made some inquiries around since. I guess my memory wasn't good.

Mr. Morris: To the extent that case is applicable I think [113] it supports us. That was a case where the individual party involved had no knowledge of the legislation and he didn't comply with the new

statute, which was an emergency measure, and so had lost his opportnuity for a hearing.

The Court: I don't think any lawyer of standing would dare, after the adverse reaction that followed in the profession, to sponsor similar legislation again, amending the practice code on a jurisdictional feature and attaching an emergency clause to it. I talked to Judge Tooze, who was one of the unfortunates in Simpson v. Winegar; he was then in partnership with Mr. Vinton; and he says there were about two dozen lawyers throughout the state, as you remember, whose appeals were wrecked for them for the same reason that Vinton & Tooze lost their appeal, simply because the law had become effective before the profession became advised of it through publication of the Session Laws. So that is, I think, one of the serious questions in this case. There were actually nine or ten days, weren't there—you gave me that figure the other day—after the publication of the Session Laws, which presented this Act to the profession as one of the acts of the Oregon Legislature—ninety days from March 20th, and the Session Laws were published nine or ten days, weren't they, before the ninety days ran out? Didn't you tell me that the other day?

Mr. Davies: They were published the very first part of June, your Honor. I don't remember. I intended to check [114] that and advise you.

The Court: Somebody told me the other day that figure was presented before Judge Skipworth down there.

Mr. Davies: That point wasn't elaborately discussed by the attorney for the plaintiff there. I think it was ninety days. We can get the precise time.

The Court: It doesn't matter. This Act was passed on March 20th.

Mr. Bigges: That is correct.

The Court: And it was approved by the Governor on that date and it became effective immediately, and so the ninety days as to accrued claims began to run then, so they all ran out June 20th, approximately, and the 1942 Session Laws were published and in the hands of the profession sometime early in June and there were nine or ten days, you said here the other day, between the time of the publication.

Mr. Davies: I am sure it would not exceed two weeks probably. It might have been somewhere between ten days and two weeks.

The Court: As bearing on the question of reasonableness of this legislation I attach a great importance to that, and I attach considerable importance to the reaction in the profession to that tinkering that was done with the practice act back there in 1927. The reaction was very violent. I haven't had time to go back and look over the periodicals of the time [115] but I am sure that the Bar Association in the state took some action about it and took a firm position against that sort of legislation. I am told, further, that the reason for that 1927 Act was because of a particular situa-

tion in a particular county. There was a lawyer's fight in a certain county in the state, and so that was the idea. The gentlemen on the bottom of the heap decided the way to correct that situation was to go to Salem and have the Legislature pass an act prohibiting the trial judge thereafter from extending ex parte the time when transcripts for appeal might be filed, as that Legislature dealt with, so all the unfortunate bystanders throughout the state who had appeals being made up at that time, and relying on ex parte orders, got caught. I imagine they had a hard time explaining to their clients the mysterious processes of legislation. I don't think anybody could approve of that. I don't think anybody would.

My recollection has been Senator Rand's father was the one who had written the information. He had denounced that way of legislating on that kind of matter bitterly, although he felt impelled in upholding it, but the books show Judge Burnett wrote the opinion of the Court.

So in this case, as to the time element and as to the 90-day clause, I think as a practical matter I am dealing with the time that was allowed to the profession and to the interested parties pretty much after the law became public [116] and notice to the profession through publication of the Session Laws, which was, as it has been said, probably only about two weeks.

Now I have had lots of difficulty with the Koshhonong decision but I think I can and should follow the construction that has been put on the statute

by the state judge who ruled on it, which has been presented. You all know that, getting in the Federal Courts, we are bound, even before Erie v. Thompson, we are bound in the construction of state statutes by the construction given them by the local judges, and this opinion you have given me from Judge Skipworth dealt with the same kind of a case as this presented here. It was a man who had an accrued claim and who brought his claim, not only more than ninety days after the passage of the Act but he brought it more than six months after the passage of the Act. So the questions were implicit in the same record before Judge Skipworth as are present here and Judge Skipworth goes the whole length in upholding the statute and denies the man relief down there and says it is a bar against the prosecuting of his claim, not because he didn't bring it within six months but because he didn't bring it within ninety days. And so it seems to me that would be just going afield, unnecessarily and improperly, if I approached a decision in this case in any different way than Judge Skipworth approached a decision of an exactly similar case. He [117] thought he was upholding the 90-day clause, and says so, and said that was what the man's rights were to be tested by, and that is what he tested them by.

So I think the question I have to decide here, and the only one I have to decide, and the only one I wish to decide, is, taking that construction of the statute, guided by the local judge as to whether the 90-day statute is unreasonable in its effect on the

operation of the Federal Wages and Hours Act, under which this man claims, and because I attach so much importance as a practical matter to the working of the emergency clause, by that I mean the fact that the statute didn't come to the notice of the public through the usual channels, the publication of the official Session Laws, until a very short time before the 90-day period ran out, I don't feel able to uphold the 90-day clause, contrary to Judge Skipworth's rulings. I am bound by his ruling, I feel, as to the state Constitutional questions that have been presented.

While the point was raised by Mr. Etling, this morning for the first time, that this was an amendment to the existing limitations statute, and did not comply with the procedural requirement of the state Constitution, that was implicit in the case before Judge Skipworth and while not presented to him there it would be presumptuous for me to consider it here, but I am not bound by Judge Skipworth's [118] holding as to the Federal question, whether or not the 90-day clause as to accrued claims arising in the Federal Wages and Hours Act, and I take a contrary opinion and will allow recovery, and will allow Mr. Etling $250 attorney's fees.

Mr. Etling: $250, your Honor?

The Court: Yes. Adjourn court until tomorrow morning, ten o'clock.

(Thereupon, at 12:40 o'clock P.M., Court was adjourned.) [119]

Tuesday, December 26th, 1944, at 10:07 o'clock A.M., the following further proceedings were had herein:

The Court:: You had better get my file in this case, too. All right, Mr. Biggs.

Mr. Biggs: We filed a motion, if the Court please, in this Kurth v. Clarke Lumber Company case to amend the findings of fact and the conclusions of law by eliminating from the findings as filed Finding of Fact No. 9 and Conclusion of Law No. 5. Both of those, your Honor, have to do with another state statute that we think is not in issue in this case, nor necessary to the decision of the case.

In Finding of Fact No. 9 is recited the provision of the Code, Section 1-2042, providing that actions may be brought "within six years upon a liability created by statute, other than a penalty or forfeiture." I think that is a correct statement of the fact but it is not, as we contend, in issue here.

Conclusion of Law No. 5 provides, "That this action was brought within the time afforded by Section 1-204 (2) Oregon Compiled Laws Annotated, 1940, the applicable state statute."

The Court: Clerk, the Findings of Fact are what we are interested in, not in the file here. You might search for them. Do you suppose somebody might have them in the recording room?

The Clerk: They might have. [120]

The Court: Go right ahead.

Mr. Biggs: We ask that those, that finding of fact and that conclusion, be eliminated, if the Court please, so that——

The Court: What did the conclusion say?

Mr. Biggs: The conclusion simply recited that the action was brought within the time provided by that Section of the Code, which the conclusion says is "the applicable state statute."

The Court: Well, I would not want to strike that out altogether. I would like to say, at least, that the action was brought within the time provided by law.

Mr. Biggs: That is all right. We have no objection to that. The position that we took was this: That the only issue raised in bar, or the only statute raised as a bar to the maintenance of this action was the special overtime statute of limitations, and if the Court finds that that is not a bar then there is no other statute pleaded as a bar and it is not necessary for the Court to specify what time the action should be brought in. It is sufficient only for the Court to say that the statute that they pleaded as a bar actually is not a bar, and then there is no issue raised as to his right to maintain the action.

The Court: I am not closing my mind until I hear you, Mr. Etling; don't think that; but I just want to get this record pointed up right. I take it that we are all agreed, regardless [121] of pleadings, in this court under the existing practice, under the new Rules of Civil Procedure we take judicial knowledge of the Oregon statutes.

Mr. Biggs: Yes, I think that is true, your Honor.

The Court: That is your understanding, Mr. Morris?

Mr. Morris: Yes.

Mr. Biggs: That is mine, too.

The Court: Now Mr. Etling, what is your feeling about it?

Mr. Etling: Your Honor, we felt at the time we put this in it was necessary to support the judgment, and certainly some statute applies. In all the cases that we have cited I believe that the courts have indicated that a certain statute applied where they have held that another did not apply.

The Court: I wouldn't think I would have to choose, though, between the six-year statute and the three-year statute.

Mr. Etling: Well, in that regard, I have this to say, though: In our original brief, page 3, we cited this Overnight Motor Transportation Company v. Missel, 316 U. S. 572, where the Supreme Court of the United States held that actions under 16-B of the Fair Labor Standards Act were not a penalty.

Now since our argument the Circuit Court of Appeals Ninth Circuit, has handed down a decision in the Culver, et al, v. Bell & Loffland, Inc., case, and they have definitely stated—and this same question was raised there—they excluded all claims except those of the three named plaintiffs. [122] The Court proceeded in practical effect to confine the three to the recovery of overtime only, this on the theory that the additional equal amount al-

lowed by the Act for liquidated damages is in reality a penalty.

In respect of these additional amounts the Court, therefore, applied Section 340 of the California Code of Civil Procedure, "which provides a one-year limitation for the commencement of an action upon a statute for a penalty or forfeiture when the action is given to an individual." And that would be the same contention as here, were they trying to invoke the three-year Oregon statute. And the Court goes on to say:

"We think the additional recovery permitted is not in the nature of a penalty. Congress called the amount 'liquidated damages,' and its terminology is entitled at least to some weight."

Then they cite some other cases, one in the Sixth Circuit, and then the leading case of Huntington v. Antrill, 146 U. S. 657, and, citing from that case, "Statutes giving a private action against the wrong-doer are sometimes spoken of as penal in their nature but in such cases it has been pointed out that neither the liability imposed nor the remedy given is strictly penal. Thus a statute giving to a tenant, ousted without notice, double the yearly value of the premises against the landlord, has been held to be 'not like a penal [123] law, where a punishment is imposed for a crime' but 'rather as a remedial than a penal law,' because 'the act indeed does give a penalty but it is to the party grieved'."

The Court goes on to decide in this particular type of case under Section 16-B of the Fair Labor

Standards Act that the remedy is a liability created by statute and it is not a penalty, and they again cite this Overnight Motor Transportation Company v. Missel case.

I think that disposes of the whole question, and I feel that the finding is essential to support our judgment. I think the contentions there were the same, and I think the California statutes were worded in the same language, only the California statutes provided the three-year limitation whereas ours provides six—three in one, and our provides three in six.

The Court: This case that Mr. Etling has been reading from is the case of Culver, et al, Appellants, v. Bell & Loffland, Inc., in the United States Circuit Court of Appeals for this Circuit, No. 10,786, decided December 5, 1944, opinion by Judge Healy. I will hand you back this leaflet, Mr. Etling. I see it comes from the Local Law Library and I will be able to get this out of our own Advance Sheets. Will you hand this to him, Mr. Clerk.

Mr. Biggs: Our position in the matter is, your Honor, it is not necessary for us either to argue or decide at this time [124] which of the state statutes is applicable if the special statute is not a bar, because that is the only issue that is raised and that is the only one that was actually argued to your Honor and the only one presented to your Honor for decision. Having found that that is not a bar, there is nothing in the way to the maintenance of this action, and to determine, other than the finding the Court might want to make the con-

clusion that the action, therefore, is brought within the time allowed by law, without at this time and in this case deciding which of the other two state statutes is applicable. I think it would be in the nature of dicta. It is not a matter that we argued to your Honor or submitted to your Honor, and probably will be a matter that at one time or another will be submitted to the Court on filed briefs or on oral argument. We ask simply that the question not be foreclosed by the decision in this case, unless we think it is not necessary to support the judgment.

The Court: Well, I won't try to decide it now. It is the kind of thing that one must not be in too big a hurry about, but I will make an expression or two and then I will ask you and Mr. Morris to send me an order reflecting your view of what the amendment should be.

I am sure that I should not mark up the finding that has been filed with the Clerk. That has passed out of my hands now. I did scratch the one up Mr. Etling submitted [125] to me, which is not uncommon practice, but the original now having passed from my hands it is a public document.

Now, too, under our rules providing for amendment of judgment and amendment of findings of fact on motion made within ten days after the entry of judgment, I take it the proper practice would be either an order denying the motion to amend, which would mean put in my hands, Mr. Etling, or an order amending the findings and conclusions setting forth with respect to your amend-

ments something like this: "Finding of Fact No. 1, heretofore made, is hereby amended to read as follows"; and "Finding of Fact No. Blank, heretofore made, be and the same is hereby stricken", or eliminated, whatever the best verbiage would be.

And likewise as to Conclusions of Law, and then after you sign it file it with the Clerk and it would be in the judgment roll, as we used to call it in the state practice.

We start with the proposition, of course, that nearly always, universally it is not wise but it is the duty of the Court not to decide more than is necessary to the decision. I think that has been tampered with in late years a great deal, but it is still traditional practice and I am inclined to accede, as I am at present advised—I want you to understand I am making full reservation of the right to go the other way; I will have to take counsel with my colleague [126] about the practice question involved, and I need to examine this new decision of our Circuit, but as I feel about it now, which I think was in my mind at the time I was marking Mr. Etling's finding, I struck out one reference there to the six-year statute because it seemed to me that I should not be picking out a section of the statute that was controlling, that not being the question before me. If there were several statutes which had a longer period than the time within which this action was brought, and one of two or one of several could apply, all of them being for a longer term, that would be for somebody else to decide at some other time which one did apply. That would be the ordinary approach

to this question. But there were some broad comments or running talk throughout the trial, which led me to the impression that everybody felt the six-year statute applied if the special legislation of 1943 didn't apply, so I went ahead and signed the finding as to that point in substantially the form submitted by Mr. Etling, and of course if I were to accede to your motion and strike out the reference to the six-year statute nobody could ever claim that I was indicating by that action that I felt the three-year penalty statute applied. I would be doing no more than simply not actually committing myself as to what statute did apply. I am particularly inclined to take this action, although I have a personal and rather fixed view about it. I am particularly inclined to take this action, because I know [127] by experience how difficult the whole field of limitations is. I know that it is an illusive subject.

Some years ago—I am not going to talk at any length now but some years ago I was surprised to find—it happened to be the State of California statute Mr. Etling just referred to—the Supreme Court construed the language "liability created by statute" down there. It doesn't all come back to me clearly now but it had something to do with the very modern law that existed in California up until recent times, that stockholders had an unlimited liability pro rata for debts of an insolvent corporation. That was in their statute; it might even have been in their constitution; and they have only changed that in recent times, either by Constitutional amendment or by statute, I forget which.

But, anyhow, in an attempted relaxation of the rule I am sure that is how it came up in an attempt to restrict that.

The California Supreme Court had to discuss what "liability created by statute" means, and that put me on my guard—that and another experience I won't speak of put me on my guard about this whole field of limitations. In short, it is wise not to say anything more than you need to at any particular time as to what limitation statutes mean, and so my inclination is strongly, because I don't feel that it prejudices the plaintiff's case in any respect, because it seems to me that it accords with my duty in the premises of [128] not deciding anything more than necessary. So my inclination is strongly to grant the amount, and will you send me up what I have asked for today because I am going away. I may take it away with me and decide it after I am gone. Whichever one of you is not the prevailing party in this matter is entitled to an exception, for whatever that means.

Mr. Etling: I would like to call the Court's attention, too, in this regard, that by the motion the defendants moved against Finding of Fact No. 9 and Conclusion of Law No. 5 but they did not move against Conclusion of Law No. 4. Does your Honor have the findings before you? Conclusion 4? You have then gone a little further and stated——

The Court: Yes, I know.

Mr. Biggs: In view of the Court's remarks just

made, I think it could very well be eliminated without prejudice to the defendants. Well, if the Court will permit me to enlarge my motion to amend, I move to amend to include Conclusion 4, although I don't——

The Court: No, you must not get too tangled up. You amend the motion and send up the form of order you think it ought to be in, and if you think it ought to include that No. 4 you include it.

Mr. Biggs: All right.

The Court: But 4 obviously refers to the liability created by the Wages and Hours Act, the Federal statute. [129]

Mr. Biggs: I think so.

The Court: What we were talking about a minute ago is the proper construction of the Oregon limitation statute, about liabilities created by statute, and, having gone as far as we have, I may just get timid and back away from the whole thing. You had just as well be prepared for that. In other words, you may not have got into action soon enough with this idea.

All right, Gentlemen. Thank you.

Mr. Biggs: Thank you, your Honor.

(Thereupon the matter was submitted.) [130]

[Title of District Court and Cause.]

REPORTER'S CERTIFICATE

I, Alva W. Person, hereby certify that I reported in shorthand all of the evidence given and arguments and oral proceedings had upon the trial of

the above-entitled cause before the Honorable Claude McColloch, Judge of the above-entitled Court, on Friday, November 24, 1944, Friday, December 8, 1944, and Tuesday, December 26, 1944; that I thereafter caused my shorthand notes of the evidence given and arguments and oral proceedings had to be reduced to typewriting, and the foregoing and hereto attached 130 pages of typewritten matter, numbered 1 to 130, both inclusive, contain a full, true and accurate record of all of the evidence given and arguments and oral proceedings had upon said trial.

Dated at Portland, Oregon, this 5th day of April, A. D. 1945.

ALVA W. PERSON
Court Reporter. [131]

[Endorsed]: No. 11048. United States Circuit Court of Appeals for the Ninth Circuit. E. H. Clarke Lumber Company, an Oregon corporation, Appellant, vs. P. N. Kurth, Appellee, and P. N. Kurth, Appellant, vs. E. H. Clarke Lumber Company, an Oregon corporation, Appellee. Transcript of Record. Upon Appeals from the District Court of the United States for the District of Oregon.

Filed April 28, 1945.

PAUL P. O'BRIEN
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11048

P. N. KURTH,
Appellee and Cross-Appellant,

vs.

E. H. CLARKE LUMBER COMPANY,
Appellant.

STATEMENT OF POINTS UPON WHICH APPELLANT WILL RELY ON APPEAL

To the Clerk of the Above Entitled Court:

The record on appeal having been transmitted by the Clerk of the District Court to the Clerk of the United States Circuit Court of Appeals for docketing, the appellant submits herewith its statement of the points upon which it intends to rely upon appeal.

1. The District Court erred in deciding that Chapter 265, Or. Laws, 1943, is not a bar to the maintenance of this action.

2. The District Court erred in deciding that Chapter 265, Or. Laws, 1943, as applied to this action unreasonably interferes with the normal operation of the Fair Labor Standards Act (Title 29, USCA, Section 201 ff.) and therefore violates the United States Constitution in that it unreasonably interferes with the power of Congress to regulate interstate commerce among the several states in a field already occupied by Congress.

3. The District Court erred in deciding that the

ninety-day period prescribed in the savings clause of Chapter 265 is unreasonably short and that Chapter 265 applied to this action is unconstitutional and void.

4. The District Court erred in rendering judgment in favor of plaintiff and against defendant.

5. The District Court erred in refusing to decide that if the ninety day period prescribed in the savings clause of Chapter 265 is unreasonably short as applied to this action, the statute should be so construed as to make the period of six months prescribed in said statute applicable to this action.

R. R. MORRIS
R. N. KAVANAUGH
DAVID L. DAVIES
HUGH L. BIGGS
Attorneys for appellant.

Due and legal service of the within Statement of points upon which appellant will rely on appeal is hereby admitted at Portland, Oregon, this 26th day of April, 1945.

BRUCE CAMERON
By E. BETZ
Attorney for Appellee and
Cross-Appellant.

[Endorsed]: Filed April 28, 1945. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

STATEMENT OF POINTS UPON WHICH APPELLEE AND CROSS-APPELLANT WILL RELY ON APPEAL.

To the Clerk of the above entitled court:

The appellee and cross-appellant submits herewith his statement of points upon which he intends to rely upon appeal.

1. The District Court erred in finding and concluding that plaintiff is entitled only to $250.00 as reasonable attorney's fees for the reason that based upon the record, proceedings, and evidence in this case such sum is clearly inadequate.

2. The finding and conclusion of the District Court that plaintiff is entitled to only $250.00 as reasonable attorney's fees is also inadequate to compensate appellee and cross-appellant for the extra work entailed in this appeal.

Respectfully submitted,

CARL W. ETLING

BRUCE CAMERON

Attorneys for Appellee Cross-Appellant.

Due and legal service of the foregoing statement of points is hereby accepted at Portland, Oregon this 2nd day of May, 1945, by receipt of a certified copy thereof.

HUGH L. BIGGS

Of Attorneys for Appellant.

[Endorsed]: Filed May 3, 1945. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL TO BE PRINTED

To the Clerk of the Above Entitled Court:

The Record on Appeal having been transmitted by the Clerk of the District Court to the Celrk of the United States Circuit Court of Appeals for docketing, the Appellant hereby designates the following portions thereof to be printed for inclusion in the printed transcript of record herein:

1. Amended complaint, omitting therefrom all of Exhibit A (Pages 1 to 7 inclusive, Exhibit A).
2. Answer to amended complaint.
3. Motion to dismiss answer.
4. Pretrial order.
5. Testimony of the witness, P. N. Kurth. (Transcript pages 3-8).
6. Remarks of Judge in deciding case. (Transcript pages 115-119).
7. Findings of Fact and Conclusions of Law.
8. Motion to amend Findings of Fact and Conclusions of Law.
9. Court's order on motion to amend Findings of Fact and Conclusions of Law.
10. Judgment.
11. Notice of appeal to Circuit Court of Appeals.
12. Notice of cross-appeal.
13. Statement of points upon which appellant will rely upon appeal.
14. Appellant's designation of contents of Record on Appeal.

15. Statement of points upon which Appellee will rely on cross appeal.

16. Appellee's additional designation of contents of record on appeal.

R. R. MORRIS
R. N. KAVANAUGH
DAVID L. DAVIES
HUGH L. BIGGS
Attorneys for Appellant.

Due and legal service of the within Designation of Contents of Record on Appeal is hereby admitted at Portland, Oregon, this 26th day of April, 1945.

BRUCE CAMERON
By E. BETZ
Attorney for Appellee and Cross-Appellant.

[Endorsed]: Filed April 28, 1945. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF ADDITIONAL PARTS OF RECORD ON APPEAL TO BE PRINTED

To the Clerk of the Above Entitled Court:

The appellee and cross-appellant hereby designates the following additional parts of the record on appeal to be printed for inclusion in the printed transcript of record herein:

1. U. S. District Court's Order to Clerk to trans-

mit entire Transcript of Evidence and Arguments to U. S. Circuit Court of Appeals.

2. Transcript of Evidence and Arguments November 24, 1944, December 8, 1944, and December 26, 1944, pp. 1-130, plus Index and Reporter's Certificate.

3. Transcript of U. S. District Court Clerk's docket entries.

4. Designation of additional portions of record and proceedings. (By plaintiff cross-appellant.)

5. Additional designation by plaintiff cross-appellant.

Respectfully submitted,
CARL D. ETLING
BRUCE CAMERON
Attorneys for Appellee Cross-Appellant.

Due and legal service of the foregoing designation of record is hereby accepted at Portland, Oregon this 2nd day of May, 1945, by receipt of a certified copy thereof.

HUGH L. BIGGS
Of Attorneys for Appellant.

[Endorsed]: Filed May 3, 1945. Paul P. O'Brien, Clerk.